83-320

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANDERSON COUNTY, TENNESSEE
and
STATE BOARD OF EQUALIZATION OF TENNESSEE,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Sixth Circuit properly reversed and remanded the district court's abstention and dismissal of a complaint by the United States alleging that a real property tax levied against its federal contractor was invalid on state and constitutional law grounds while the contractor, at the direction and with the financing of the United States, was contemporaneously litigating the validity of the tax on state law grounds in on-going proceedings in the state courts.

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The Attorney General of the State of Tennessee, on behalf of the State Board of Equalization of Tennessee, and Anderson County, Tennessee, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 20, 1983.

OPINIONS BELOW

The opinion of the District Court (Appendix A at A-1) is reported at 547 F. Supp. 18 (E.D. Tenn. 1982). The opinion of the Court of Appeals (Appendix B at A-4) was entered on April 20, 1983 and has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 20, 1983. The Order denying the petitioners' timely petition for rehearing with a suggestion for a rehearing *en banc* was entered on June 10, 1983. (Appendix C at A-14). This petition was filed within ninety (90) days of that date. On August 9, 1983, the Court of Appeals denied petitioners' motion for stay of mandate pending the filing of this petition. (Appendix D at A-15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent parts of the Tennessee Code Annotated, Sections 4-5-117, 4-5-322, 67-401, 67-501, 67-601(1), 67-602(6), 67-606, 67-831(3), 67-1805 (Supplement 1980), are set forth in Appendix E at A-15. 28 U.S.C. § 1341 (1976) is set forth in Appendix F at A-32.

STATEMENT OF THE CASE

1. The United States owns in fee simple the Oak Ridge Reservation, consisting of 37,185 acres of land in Anderson and Roane Counties, Tennessee, upon which are located large federally-owned production and research facilities. Union Carbide Corporation ("Carbide") has a contract with the United States Department of Energy ("DOE") to perform certain work and services related to nuclear energy and the production of nuclear weapons components at the Oak Ridge Reservation. The contractual relationship between the DOE and Carbide was described by the Supreme Court in *United States* v. *Boyd*, 378 U.S. 39, 41 (1964), as follows:

> Carbide's contract obligates it to manage, operate and maintain the Oak Ridge plants and facilities in accordance with such directions and instructions not inconsistent with the contract as the Commission deems necessary to issue

from time to time. In the absence of applicable instructions, Carbide is to use its best judgment, skill and care in all matters pertaining to performance. Carbide is charged with the duty of procuring materials, supplies, equipment and facilities although the Government retains the right to furnish any of these items. Payment for purchases is to be made with government funds, and title to all property passes directly from the vendor to the United States. Carbide is generally free to make purchases up to $100,000 without prior approval.

Although Carbide exercises considerable managerial discretion from day to day in performing the contract, the Commission retains the right to control, direct and supervise the performance of the work and has issued directions and instructions governing large areas of the operation. Carbide has no investment in the Oak Ridge facility and at the time of this litigation employed some 12,000 employees and supervisors to perform the contract. Its annual fee, renegotiated periodically, was $2,751,000 at the time of suit.

Although this Court wrote the *Boyd* opinion in 1964, the current contract between Carbide and the United States has not materially changed the relationship between the parties. One of the plants that Carbide manages, operates and maintains under the contract is the Y-12 Plant, which is located in Anderson County, Tennessee.

2. On June 3, 1980, the Anderson County property assessor notified Carbide of the Assessment by the County against the Corporation's separate taxable interest in the Y-12 Plant. The county assessor had concluded that Carbide's contractual rights of access, possession, and use of the Government's Y-12 Plant in carrying out its contract to produce nuclear weapons components are incidents of ownership under the bundle of rights that make up property or ownership and are taxable "real pro-

perty" under Tennessee law.[1] While Tennessee purports to tax all interests in real property pursuant to TENN. CODE ANN. §§ 67-401, 67-601(1) and 67-602(6), these statutes have never before been applied to interests in real property apart from a general freehold, other than leasehold interests.

3. On July 15, 1980, the United States istituted an action in the United States District Court for the Eastern District of Tennessee, Northern Division in which the Government raised the issues of whether Anderson County may levy, under Tennessee law, a real property tax on the interest of Carbide, if any, in the Y-12 Plant, and whether the United States Constitution prohibits such tax. The United States also sought an injunction against the County from proceeding with the taxation of Carbide. On July 23, 1980, the injunction was denied and the United States and Anderson County were ordered by the district court to appear before the Anderson County and Tennessee State Boards of Equalization to determine the issues and, if either were not satisfied, to appear again before the district court. Appendix H at A-34. The United States did not file a petition for an appeal from the interlocutory order.

The United States, pursuant to the court's Order, and Carbide, at the Government's direction, then filed appeals before

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[1]The county assessor was guided by the State of Tennessee Assessors Manual which on page AP-10 (Appendix G at A-33) states:

> The term real property refers to the interest, benefits, and rights inherent in the ownership of the physical real estate.
>
> The benefits of ownership are derived from the Bundle of Rights Theory, which claims that the owner has the right to use the real estate, to sell it, to lease it, to enter it, or to give it away as he so desires.

the County Board.[2] A copy of the August 28, 1980 appeal of the United States before the County Board is at Appendix J at A-38. In September, 1980, the County Board concluded that Carbide had a separate taxable interest in the real property of the Y-12 Plant, and that the value of the interest was $370,000,000.

4. The United States on January 13, 1981 appealed the County Board's decision to the State Board of Equalization on state law grounds that (1) Tennessee law does not provide for taxation of Carbide, (2) the Y-12 Plant is exempt from taxation under Tennessee law because it is owned by the United States, and (3) the County Board assessment was excessive. The United States then advised the State Board it intended to direct Carbide to pursue its federal defenses in the federal court. These defenses were that the County tax was invalid because it was an illegal attempt to tax property owned by the United States and that the tax discriminates against the United States. The United States' appeal of January 13, 1981 is at Appendix K at A-42. Carbide filed a substantially identical appeal. The United States subsequently withdrew its appeal.[3]

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[2] The contract between the United States and Carbide provides that the taxes assessed and the costs of any litigation will be allowable costs if the contractor follows the directions of the United States with regard to litigation concerning the taxes. See Article XXIV, *State and Local Taxes* and Article XVIII, *Litigation and Claims*, Appendix I at A-35. Indeed, in its appeals to the County and State Board, the United States represented that "insofar as it is able to do so, it will require its contractor, Union Carbide Corp., to litigate any federal claims in the Federal Courts." Appendix J at A-38 and Appendix K at A-43. Counsel for the United States in its argument before the Sixth Circuit stated that the costs of Carbide's litigation before the state courts is being borne by the United States.

[3] By a letter dated January 28, 1981, the United States withdrew from the appeal, neither submitting to the jurisdiction of the State Board "nor waiving its sovereign immunity in any manner." (Appendix L at A-47).

On June 10, 1981, the Assessment Appeals Commission[4] ruled that (1) the contractual relationship between the United States and Carbide did not create a separate real property interest in the Y-12 Plant that was taxable to Carbide under the laws of Tennessee, (2) Carbide was exempt from taxation pursuant to TENN. CODE ANN. § 67-501, which exempts "all property of the United States . . . used exclusively for public . . . purposes", (3) Carbide was an agent of the United States, and (4) the tax discriminated against the United States and those with whom it deals.[5] The assessment was, accordingly, voided.

5. On June 15, 1981, Anderson County filed a petition to review the decision of the Assessment Appeals Commission with the State Board of Equalization. On July 20, 1981, the federal district court dismissed, without prejudice, the United States' complaint of July 15, 1980 on the ground that neither Anderson County nor the United States had appeared before the court within a year. On January 8, 1982, the State Board in a 4-3 decision reversed the decision of the Assessment Appeals Commission, stating the tax assessment was valid. The State Board adjudged that (1) the United States had granted to Carbide the rights and interests of access, possession and use of the Y-12 Plant for the purpose of performing its contract with the United States and that such rights and interests are real property as defined by TENN. CODE ANN. § 67-601(1), which rights must be taxed as real property to Carbide pursuant to TENN. CODE

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[4] The State Board of Equalization pursuant to TENN. CODE ANN. § 67-831 created the Assessment Appeals Commission and delegated to the Commission the jurisdiction and duties conferred by law upon the State Board to hear and act upon complaints and appeals regarding assessment, classification and value of property for purposes of taxation. Decisions of the Commission are subject to review by the State Board.

[5] The Assessment Appeals Commission has five members. Four members heard this case, three members voted that Carbide was not taxable and one member abstained.

ANN. § 67-602(6), (2) Carbide was not exempt from taxation pursuant to TENN. CODE ANN. § 67-501, which exempts "all property of the United States . . . used exclusively for public . . . purposes" because the tax was on Carbide and not the United States, and (3) Carbide's status under the contract was that of an independent contractor and, consequently, the assessment was not invalid under the United States Constitution.[6]

6. The United States on February 12, 1982, eighteen months after its initial complaint, filed a second complaint in the district court raising similar issues as in its first complaint. The United States sought a declaration that the contract between Carbide and the United States neither conveyed nor vested in Carbide any real property ownership, that the State Board's interpretation of the contract was erroneous, the attempted imposition of tax was unconstitutional because it constituted a discriminatory tax against the United States, and the tax was void since Carbide, under its contract with the Government, acquired only the privileges of access, possession and use of the Y-12 Plant which the United States alleged were not taxable under the laws of the State of Tennessee.[7]

7. After the United States reinstituted its court action in the district court, Carbide at the direction of the Government on March 8, 1982, pursuant to the Tennessee Uniform Administrative Procedures Act, filed in the Davidson County Chancery Court a petition for judicial review of the State Board's decision. (Appendix N at A-61). The petition in paragraph 5, Appendix N at A-64, states:

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[6] Although Carbide did not argue any federal defenses before the State Board, Anderson County did so because constitutional issues were involved which had to be considered by the State Board.

[7] In this second complaint filed with the district court, the United States did not seek an injunction against the on-going proceedings. Appendix M at A-50. In its first complaint filed July 15, 1980, the United States had sought such an injunction.

5. The issues raised in and grounds for this Petition for Review by Union Carbide Corporation are:

A. The decision of the State Board of Equalization is violative of Tennessee statutory law in its resolution of the following questions.

(a) . . .

(b) Whether Union Carbide Corporation owns any interest, separate from the general freehold, in the Y-12 Plant facility that would, within the meaning of Sec. 67-601(1) or 67-602(6) or any other Tennessee statute, authorize the assessment of ad valorem real property taxes against Union Carbide Corporation.

(c) Whether the valuation of the real property interest of Union Carbide Corporation as fixed by the Board of Equalization, if any such real property interest exists, is excessive.

8. On April 15, 1982, the district court granted the motion of the State of Tennessee and Anderson County to abstain and dismiss the complaint of the United States. *United States* v. *Anderson County, Tennessee,* 547 F. Supp. 18 (E.D. Tenn. 1982). The district court concluded that the present case was indistinguishable from *United States* v. *Ohio,* 614 F.2d 101 (6th Cir. 1979), where the Sixth Circuit relied on the abstention doctrines set forth in *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), and *Younger* v. *Harris,* 401 U.S. 37 (1971), and adopted the approach of the Second Circuit *In re Levy,* 574 F.2d 128 (2nd Cir. 1978). The district court found that the attempt of the United States to distinquish *Ohio,* on the ground that there was no unsettled question of state law was without merit, stating,

> Union Carbide argues in its petition for review filed in the Chancery Court that the assessment is contrary to Tennessee law in that the Y-12 Plant is used for a public pur-

> pose and is, therefore, exempt from taxation pursuant to Tenn. Code Ann. § 67-501, and further that under Tennessee law it has no taxable interest in the Y-12 Plant. The issues raised by Carbide are important ones and relate only to state law. The Sixth Circuit [in *Ohio*] attached no significance to the fact that the Government relied only on Ohio law in its complaint. The Court recognized that the constitutionality of the state taxation was "bound to surface."[4] 614 F.2d at 108. In the present case the United States raised the constitutional issue in its complaint.

547 F. Supp. at 19, Appendix A at A-2—3. The district court stated that abstention was required where the possibility of friction between the state and federal governments could thus be avoided. Then the district court would not be required to make a constitutional determination based on a speculative interpretation of state law, and the on-going state proceedings might moot the constitutional issues. Further, the district court ruled that "the United States will not be prejudiced by the Court's abstention in this case. The United States may seek to intervene in the state proceeding and the constitutionality of the taxation can be raised, either by Union Carbide or the United States." 547 F. Supp. at 19-20. On May 6, 1982, the United States appealed the district court's ruling to the Sixth Circuit.

9. On February 11, 1983, the Chancery Court of Davidson County, Tennessee affirmed the State Board decision ruling that Carbide has a separate interest in real property of the Y-12 Plant under Tennessee law and that the interest is subject to property taxation in Tennessee and is not exempt under state or federal law. Although Carbide refrained from raising any federal defenses before the Chancellor, the State of Tennessee

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[4] In the case at bar, the constitutional issues surfaced and were ruled on by the State Assessment Appeals Commission, the State Board of Equalization and the Chancery Court.

and Anderson County did argue the constitutional issue, because the possible immunity of Carbide from State taxation had to be addressed.[9] The Chancellor's Memorandum is at Appendix O at A-74.

10. On April 20, 1983, the Sixth Circuit reversed the district court's absention and dismissal of the United States' complaint filed February 12, 1982, stating that a federal forum may abdicate its jurisdictional powers only in the most exceptional circumstances. The court distinquished *United States* v. *Ohio*, 614 F.2d 101 (6th Cir, 1979), stating that while abstention was recognized in that case, it was because a federal constitutional issue might have been mooted or presented in a different posture by a state court determination of pertinent state law. In discussing *Pullman*, the Sixth Circuit concluded there were no unsettled questions of State law in the Carbide case, stating "the relevant sections of the Tennessee Code Annotated are clear in imposing an ad valorem tax on real property interests and need no judicial construction". Appendix B at A-9. Rather, the Sixth Circuit concluded that the unsettled question is

> whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant. A negative response to the inquiry vitiates the necessity of ascertaining the authority of the State of Tennessee to impose a tax upon Union Carbide. Further, interpretation of a contract wherein the United States is a party is a *federal* issue. (emphasis in original)

Appendix B at A-10.

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[9] In *Boyd, supra,* Carbide was found by this Court not to be immune, under the same contractual arrangement, from state taxation. In *United States* v. *New Mexico,* 455 U.S. 720 (1982), this Court found three other DOE management contractors were not immune from state taxation.

11. The Sixth Circuit then addressed the *Younger* v. *Harris*, 401 U.S. 37 (1971), brand of abstention, noting the *Younger* doctrine applies where (1) there is an on-going proceeding, (2) the proceeding is criminal, and (3) no unusual circumstances exist which would counsel against abstention, such as inability to raise a constitutional challenge in state proceedings. The court stated that the second prong of the *Younger* tests has been expanded to warrant abstention in non-criminal proceedings but only "when important state interests are involved." Appendix B at A-11. The court assumed, without deciding, that the first prong was satisfied, but then stated the second was not. The court said that, "Tennessee's interest in administering its own tax laws without federal intervention may qualify as an important state interest when the tax is assessed against an entity *other* than the United States." Appendix B at A-11.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's reversal of the decision of the district court to abstain and dismiss the United States' claim conflicts with this Court's guidance enunciated in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ___ U.S. ___, 103 S.Ct. 927 (1983). While the Sixth Circuit quotes *Colorado River*, 424 U.S. at 813, stating the abstention doctrines are "extraordinary and narrow exception[s] to the duty [of the federal forum] to adjudicate [those] controvers[ies] properly" asserted, it fails to note the three general categories this Court discussed in which abstention is appropriate, each of which applies directly to the case at bar. *Colorado River*, 424 U.S. at 813-817.

Moreover, this Court in *Moses H. Cone Memorial Hospital*, ___ U.S. ___, ___, 103 S.Ct. 927, 836, construed the *Colorado River* decision to establish a fourth category of abstention. The Court reasoned

> that the District Court's dismissal was proper on another ground — one resting not on consideration of state-federal comity or on avoidance of constitutional decisions, as does abstention, but on "considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."

Dismissal in the case *sub judice* was appropriate and in accordance with the guidance set forth in *Colorado River* and *Moses H. Cone*.

In the case at bar, the application of uncertain state law to determine the validity of the real property tax imposed on Carbide is the predicate to the emergence of the constitutional issue. Carbide, at the direction and with the funding of the United States, has denied its taxability under state law in proceedings over a three year period before the state agencies and courts.

The decision of the Chancery Court of Davidson County, Tennessee in this case is the first ruling ever in this state allowing the taxation of real property interests such as those involved here. That case is presently pending before the Tennessee Court of Appeals and will undoubtedly be appealed to the Tennessee Supreme Court. Those issues have now been raised and will be raised again by other taxing authorities in Tennessee, indicating this is a matter of significant public importance involving a governmental function, property taxation, inherent to state government and essential to its continued existence.

The United States in its brief before the Sixth Circuit requested a "uniform ruling" for all its DOE facilities. While such a ruling would be in contravention of established case law, as will be detailed below, it is indicative of the importance of this case in setting precedents for procedures which have been followed and which have resulted in state and federal jurisdictional conflict, or potential conflict, and confusion as to previous rulings of this Court.

Since it is important to the State of Tennessee to follow orderly and established procedures for property valuation and taxation, the Sixth Circuit decision marks an unwarranted intrusion on the right of Tennessee to interpret its own statutes. Further, a declaratory judgment suit serves to delay the imposition of a state tax and is counter to the intent of the Anti-Injunction Act. The procedure followed by the United States of litigating simultaneously in state and federal proceedings is an unwise use of judicial resources.

The only reasonable course of action in this case was that taken by the district court, abstention from and dismissal of the federal complaint. The decision of the Sixth Circuit would permit needless, expensive and confusing parallel litigation of this matter in the state and federal courts. No case presents a clearer justification for abstention and dismissal than does the case at bar. Presently, Carbide in its brief before the Tennessee Court

of Appeals, complains of the "dilemma" posed by federal and state concurrent suits, a dilemma created by the procedures devised by the United States in directing Carbide's litigation. This Honorable Court should exercise its supervisory powers and resolve this jurisdictional controversy, not only for the resolution of this particular case, but also for guidance in future cases of this nature.

I.

Pullman Abstention Is Appropriate Here Because A State Court Determination May Moot Federal Issues.

In *Colorado River,* this Court stated:

> Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law" . . . . *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

424 U.S. at 814.

The Sixth Circuit concluded that in this case there are no unsettled questions of state law nor is there a need for the state court to interpret an ambiguous state statute because the "relevant sections of the Tennessee Code Annotated are clear in imposing an ad valorem tax on real property interests and need no judicial construction". Appendix B at A-9. The relevant Tennessee laws which the Sixth Circuit finds clear are (1) TENN. CODE ANN. § 67-401 which states that property shall be taxed except such as may be specifically exempt,(2) TENN. CODE ANN. § 67-601(1) which defines "real property" for tax purposes to include land, buildings, structures, affixed machinery and equipment and "all rights thereto and interests therein, equitable as well as legal", and (3) TENN. CODE ANN. § 67-602(6) which states that "all interests of whatsoever character . . . in real property" owned separate from the general

freehold, shall be assessed to the owner of that interest as real property.[10] However, while these statutes have been applied by the Tennessee Supreme Court to tax fee simple titles and leasehold interests, the issue of whether other interests are taxable has never reached that Court.

In the course of this appeal, the Tennessee tax authorities have differed on whether Carbide's possession and use of the Y-12 Plant is taxable under Tennessee law. The Assessment Appeals Commission ruled that Carbide was not taxable, the State Board of Equalization reversed 4-3, and the Chancery Court affirmed. The Chancery Court's ruling is the first judicial decision in Tennessee on this point and has been appealed by Carbide to the Tennessee Court of Appeals.

Faced with the fact that the pertinent Tennessee law has never been interpreted by any Tennessee appellate court, the Sixth Circuit cites *United States* v. *Nevada Tax Commission,* 439 F.2d 435 (9th Cir. 1971), for the proposition that abstention was deemed inappropriate where the state taxing statute was facially unambiguous irrespective of the fact that the statute has never been construed by the state courts. Yet, the Ninth Circuit in *Nevada Tax Commission,* in upholding the district court's refusal to abstain, relied heavily on the fact that while "the use tax provision had not been considered by the Nevada courts, there had been consistent rulings on the critical language of the statute by courts of other states which have similar statutes". 439 F.2d at 440. Such interpretation diminished the amount of ambiguity of the statute in the eyes of the district court. No party to the judicial proceedings involved in the case at bar, however, has pointed to a state having a similar statute which may have had clarifying judicial interpretation.

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[10] TENN. CODE ANN. §§ 67-401, 67-601(1) and 67-602(6) are found in Appendix E at A-21—A-26.

The Sixth Circuit cited *United States* v. *Bureau of Revenue of New Mexico,* 291 F.2d 677 (10th Cir. 1961), for the proposition that abstention is inappropriate where a state taxing statute is unambiguous and leaves no room for construction. The Tenth Circuit in discussing the New Mexico statute states:

> The New Mexico statute in express terms makes the tax applicable for sales of metalliferous mineral ores to the United States, its department or agencies, and exempts any such sales made to the State of New Mexico and to societies, hospitals, fraternal or religious organizations not organized for profit. The statute is unambiguous and leaves no room for construction.

291 F.2d at 679.

There was no room for interpretation of the New Mexico statute, which patently discriminated against the United States. However, in the case at bar, Carbide before the state courts and the United States in its complaint disagree with the State Board's and the Chancery Court's interpretation of the Tennessee statute. Moreover, the Tennessee administrative authorities passing on the issue were sharply divided. The Sixth Circuit clearly misconstrued the Tennessee law and the proceedings underway in reaching the conclusion that there is no unsettled question of state law in this case. Any federal court interpretation of the Tennessee statute at this time is purely speculative. If the laws of Tennessee are found not broad enough to cover an interest in real property such as Carbide has in the Y-12 Plant, the constitutional issues will be moot.

The first category of *Colorado River* holds that abstention is appropriate where constitutional issues may be mooted by a state court decision. Thus, abstention by the federal court was appropriate.

II.

Burford Abstention Is Appropriate Because Of Tennessee's Inherent Interest In Administering Its Property Tax Laws.

In *Colorado River,* this Court identified a second abstention category:

> Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case at bar (citations omitted) . . . In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and similar cases could be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial policy concern.

424 U.S. at 814, citing *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943).

This case is important to the general public in Tennessee, which has a vital interest in seeing that the tax laws of the state are administered under a consistent plan that assures uniformity of taxation so that each taxpayer pays its just share of the taxes. Toward this end, the Tennessee legislature has established a system of administrative and judicial review of any complaints and appeals from the assessment of taxes which centers on the State Board of Equalization.

Under the Tennessee system of taxation, the State Board of Equalization is charged with the principal responsibility "to effect the equalization of assessments, in any taxing jurisdiction within the State . . . ." TENN. CODE ANN. § 67-831(a)(3). Judicial review of State Board decisions is taken pursuant to TENN. CODE ANN. § 4-5-322 of the Uniform Administrative Procedures Act. The State Board has broad discretion to review

all matters of assessment. Its decisions are subject to judicial review and can be reversed, in essence, for constitutional or statutory violations, abuse of discretion, or lack of substantial evidence. TENN. CODE ANN. § 4-5-322(h).

It would be disruptive to the Tennessee taxing procedures and the efforts of the state to equalize tax assessments if the federal courts defined the nature of "real property" for tax purposes, for even to declare that rights do, or do not, exist under the contract, in this instance, would require an interpretation of state property laws by a federal court, and since they are unsettled, the State of Tennessee would find its statutes effectively being fashioned not by its own administrative and judicial procedures but by a federal court. As Justice Douglas stated in a concurring opinion in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 335 (1943).

> The Courts do not sit merely to enforce rights based on orders of the state administrative agency. They sit in judgment on that agency. That, to me, is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy. That interference would be a continuing one, as the opinion of the Court points out. Moreover, divided authority would result. Divided authority breeds friction . . . .

The Sixth Circuit stated that the unsettled question, rather than being one of state law, is

> whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant. A negative response to the inquiry vitiates the necessity of ascertaining the authority of the State of Tennessee to impose a tax upon Union Carbide. Further, interpretation of a contract wherein the United States is a party is a *federal* issue. *United States* v. *Allegheny County*, 322 U.S. 174 (1944). (emphasis in original)

While the interpretation of Carbide's contractual relationship and the interest conveyed to Carbide may be a federal issue, it is not a substantial issue in this case, for all parties to the litigation agree that the contract conveys to Carbide the right of access and use in the Y-12 Plant for the performance of its contract and no contractual interpretation is necessary.[11] It is whether the right of access and use is taxable as real property that is at issue, and, finally, the real question is whether federal or state law defines "real property".

Where federal law governs, but there is no Congressional guidance on the subject, it is for the federal courts to fashion the governing rule of law according to their own standards. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). In this regard, "This Court's decisions applying 'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the nation." *United States* v. *Yazell*, 382 U.S. 342, 354 (1966). Rights of property ownership are not at all uniform among the fifty states. Under the federal system, property ownership is governed by state law. *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946).

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[11] Paragraph 34(C) of the United States' complaint in the district court states:

> (C) Even though Carbide enjoys the privilege of access in and to the Y-12 Plant and is using the real property of the Y-12 Plant solely for the purposes of performing work for the Government under its contract, defendant Anderson County cannot tax Union Carbide for the privilege because Tennessee law does not permit taxing private companies for the privilege of possessing or using tax-exempt real property.

Appendix M at A-59.

Carbide's brief, in the case pending before the Court of Appeals of Tennessee, Middle Section, states that the Chancery Court erred

> in finding, it being the first Tennessee Court to so hold, that T.C.A. 67-601(1) and T.C.A. 67-602(6) are broad enough to include as taxable a possessory interest in real property when the fee in the property is separately owned by another.

In *Reconstruction Finance Corp.*, Section 10 of the Reconstruction Finance Corporation Act, as amended, consented to state and county taxation of "any real property" owned by the Corporation, but the statute itself did not define "real property". A real property tax was levied by Beaver County, Pennsylvania against machinery used by a lessee of Reconstruction Finance Corp. for the manufacture of airplane propellers for the Government. Although the lease contract provided that the machinery should "remain personalty notwithstanding the fact it may be affixed or attached to realty", the Pennsylvania Supreme Court applied a state definition of "real property" so as to treat machinery, equipment, fixtures and the land on which a manufacturing establishment is located as an integral real property unit and upheld the tax.

On appeal, the United States argued to this Court that state law should not govern the definition of what constitutes "real property" for local taxation, but rather the federal courts should define the terms "real property" when it is used in a federal statute, so that Congress' laws could operate uniformly throughout the nation and the federal programs remain unimpaired.[12] This Court held in *Reconstruction Finance Corp.*, however, that since the federal statute involved did not define "real property", the state law definition must be used, as long as the state law does not discriminate against the Government or patently run counter to terms of the Federal Act. The Court concluded:

> Concepts of real property are deeply rooted in state traditions, customs, habits, and laws. Local tax administration

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[12] In the case at bar, the United States made the identical argument before the Sixth Circuit, when it defined its interest to be a "nationwide, consistent and uniform interpretation of its Atomic Energy Contracts, and a uniform and consistent interpretation of its ownership rights in the various atomic energy weapons plants and facilities in the United States." Page 23 of the United States' brief before the Sixth Circuit.

> is geared to those concepts. To permit the states to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend. The fact that Congress subjected Defense Plant Corporation's properties to local taxes "to the same extent according to its value as other real property is taxed" indicated an intent to integrate Congressional permission to tax with established tax law assessment and collection machinery.

328 U.S. at 210.

Some seven years after *Reconstruction Finance Corporation*, by the Act of August 13, 1953 (Ch. 432, 67 Stat. 575), Congress repealed former section 9(b) of the Atomic Energy Act of 1946, which had exempted from state taxation Carbide and the other Atomic Energy Commission contractors, and placed them in the same position as other government contractors regarding taxation by state and local governments, that is, having only such immunity from taxation as arises by virtue of the Constitution as interpreted by the courts. *United States* v. *Boyd*, 378 U.S. 39, 49 (1964). In repealing section 9(b), Congress did not provide any guidelines as to the definition of taxable property; thus *Reconstruction Finance Corporation*, which left taxation of real property to state court determination, is appropriate.[13] This Court, in discussing where in its choice of applicable law it has selected state law, noted in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947), that

> it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions, through failure to make

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[13] In the case at bar, the Sixth Circuit erroneously based its decision in this regard on *United States* v. *Allegheny*, 322 U.S. 174 (1944). This Court has noted the difference between *Allegheny* and *Reconstruction Finance Corp.*, *See United States* v. *Yazell*, 382 U.S. 341, 354 n. 29.

> other provision concerning matters ordinarily so governed. (citing) *Blair* v. *Commissioner*, 300 U.S. 5; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204.

Accordingly, in 1959, when the Tenth Circuit was faced with the issue of whether chattel mortgages of the Commodity Credit Corporation were entitled to priority over tax liens of Kiowa County, Colorado, the court noted that the Commodity Credit Corporation Charter Act, did not define grain storage facilities financed by the Commodity Credit Corporation as to whether they were personal or real property and in *United States* v. *Mays*, 264 F.2d 317, 320 (10th Cir. 1959), stated,

> And there being no Congressional provision making the classification for such purpose, in the absence of objectionable discrimination against the security interest of Commodity, the question whether the buildings constituted personal property for purposes or local taxation under the state law or constituted integrated elements of integral real property units for such purpose must be determined by the law of Colorado. *Reconstruction Finance Corp.* v. *Beaver County*, 327 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172.

The importance of this Court's teachings in *Reconstruction Finance Corporation*, and as applied in another context by *Mays*, is that the unseemly potential conflicts between federal and state tribunals interpreting peculiarly state law matters are avoided when it is left to the state involved to define the parameters of property interests for tax purposes absent a Congressional mandate that another rule should apply. Thus, in this case, these considerations also justify abstention by the district court.

III.

Younger Abstention Is Appropriate Because Plaintiff Seeks To Enjoin Collection Of State Taxes.

In *Colorado River*, this Court identified a third abstention category:

> Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. *Younger* v. *Harris*, 401 U.S. 157 (1943) . . . or collection of state taxes, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943).

424 U.S. at 816.

The case at bar falls squarely in category three of this Court's *Colorado River* abstention analysis. The United States does not allege, nor can it creditably be claimed, that the state proceedings involve "bad faith, harassment or a potentially invalid state statute." Indeed, the Sixth Circuit does not even comment on that issue.

Distinguishing *Younger*, the Sixth Circuit notes that the

> doctrine facially applies where (1) there is an on-going or pending state proceeding, (2) the proceeding is criminal and (3) no circumstances exist which would counsel against abstention, such as prosecution under a flagrantly unconstitutional statute, bad faith prosecution or inability to raise the constitutional challenge in the state proceeding. The second prong of the *Younger* three-tier test has been expanded to warrant abstention in non-criminal proceedings but only when "important state interests are involved."

The court below assumes, without deciding, that in the instant cause the first and third prongs are satisfied, but that "Tennessee's interest in administering its own tax laws without federal intervention may qualify as an important state interest when a tax is assessed against an entity *other* than the United States". (emphasis in the original). Appendix B at A-11). The

lower court is in error. In this case, the County has not assessed the United States, but has assessed Carbide's separate and distinct taxable interest in the Y-12 Plant, and Carbide is litigating the tax in the state courts. This Court has ruled that Carbide is an independent contractor and is not an instrumentality of the Government. *United States* v. *Boyd*, 378 U.S. 39 (1964). Contrary to the opinion of the Sixth Circuit, Carbide does not stand in the "Government's shoes" and thus does not enjoy the Government's immunity. *U.S.* v. *New Mexico*, 455 U.S. 720 (1982). The legal incidence of the real property tax is upon Carbide. *See* TENN. CODE ANN. § 67-1805. While the United States may be a "party of interest", it is solely because it volunteered pursuant to its contract to assume the economic burden of the tax. It is clear that Anderson County is attempting to collect a real property tax from Carbide, not the United States, and that the United States' complaint in the district court is restraining that collection.

This Court's *Colorado River* third category abstention doctrine is implicitly recognized in the Anti-Injunction Act, 28 U.S.C. § 1341 (1976). While the United States has not sought an injunction or other coercive relief in the state courts, the fact that it seeks a declaratory judgment in the district court that Carbide is not taxable under Tennessee law and that the tax is unconstitutional has the same effect. As this Court stated in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299:

> It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended.

See California v. *Grace Brethren Church*, ___ U.S. ___, 102 S.Ct. 2498 (1982). Abstention in this case is thereby in accord with this Court's third abstention category enunciated in *Colorado River*.

IV.

Dismissal Under Colorado River Is Appropriate To Avoid Piecemeal Litigation And Conserve Judicial Resources.

Although it is petitioners' contention that this case requires abstention under the three categories above, there is an alternative fourth ground which requires a reversal of the circuit court's decision in the instant case. This Court held in *Colorado River*, 424 U.S. at 817 that:

> there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration giving regard to conservation of resources and comprehensive disposition of litigation". *Kerotest Mfg.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952).

This Court stated that in balancing jurisdiction, principles vary in importance from case to case. Avoidance of piecemeal adjudication is one such principle. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Co.*, ___ U.S. ___, 103 S.Ct. 927 (1983). For three years, under the Government's direction and financing, Carbide has been, and is today, challenging in sate proceedings the very taxes the United States seeks to litigate in the district court. By directing its contractor to avoid raising constitutional issues in the state proceedings, and by refusing itself to submit to the jurisdiction of the state as ordered by the district court, the United States seeks to litigate the case contemporaneously in parallel state and federal pro-

ceedings. While the United States reserves the right to raise constitutional issues as well as state issues in the federal court, Carbide's challenge in the state courts inevitably raises questions of constitutionality that must be addressed. The Tennessee boards and court have all ruled on the constitutional issues. An attempt to separate artificially the constitutional questions and reserve them for a federal forum and also argue state issues in both state and federal forums is a course of action that will result in confusion as state and federal tribunals rule piecemeal or in toto on the same issues.

These difficulties were avoided by an earlier ruling of a different Sixth Circuit panel in *United States* v. *Ohio*, 614 F.2d 101 (6th Cir. 1979), where that court attached no significance to the fact that the Government relied only on state law defenses. The court held that the "submerged question of the constitutionality of the state taxation was bound to surface" and abstained and dismissed, referring the case to the appropriate Ohio boards and courts for a decision on all the issues. This case is indistinguishable from *Ohio* and thus the present ruling of the Sixth Circuit conflicts with its earlier decision.

This Court has stressed that the pertinent inquiry in deciding whether to apply the *Younger* doctrine is whether the state proceedings afford an adequate opportunity to raise constitutional claims. The irony of this case is that the United States was ordered by a federal court to proceed through the state administrative bodies and courts and, after initially filing with the County Board of Equalization, refused thereafter to submit to state jurisdiction, directing its contractor to refrain from arguing constitutional issues in the state courts. Clearly, the opportunity to raise constitutional issues is present.[14] *See Juidice* v.

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[14] Rule 19(e) of the Tennessee Rules of Appellate Procedure will allow the United States to Intervene in the state proceedings. The constitutional issues will already be before the state appellate court.

Vail, 430 U.S. 327, 337-338 (1977). This Court has ruled that if the opportunity to raise constitutional issues is afforded, proper deference to the state's interest in its on-going proceedings in its own forums requires that its judiciary be allowed to consider constitutional issues. *Moore* v. *Sims*, 442 U.S. 415 (1979).

This Court in *Moses H. Cone Memorial Hospital*, ___ U.S. at ____, 103 S.Ct. at 937, citing *Colorado River*, also stated that litigation should occur in the forum with "the greatest experience and expertise assisted by state administrative officers acting under state courts". This case concerns taxation of real property which, if taxable, will involve valuation. For the state to have any semblance of equality of its assessments, valuation must be determined by the County or State Boards of Equalization in accordance with TENN. CODE ANN. § 67-606. The forums having greatest expertise in ad valorem taxation are the state board and the state courts, and it is those forums that most likely assure equality in taxation. "Federal courts may not assess or levy taxes." *Moses Lake Homes, Inc. et al.* v. *Grant County*, 365 U.S. 744, 752 (1961).

Moreover, there are other factors to consider in determining jurisdiction.

> In addition, we noted that other factors in this case tended to support dismissal - the absence of any substantial progress in the federal court litigation; the presence in the suit of extensive rights governed by state law; . . . and the Government's previous willingness to litigate similar suits in state court.

Moses H. Cone Mem. Hosp., 103 U.S. at 937, citing *Colorado River*.

In the case at bar, no progress has been made in the federal court litigation, whereas after three years the state proceedings

are pending before the Tennessee Court of Appeals. This lawsuit concerns extensive rights governed by state law as discussed under Parts I and II. Prior to this case, the United States in similar cases has shown a willingness to litigate in state courts. In *United States* v. *Boyd*, 378 U.S. 39 (1964), and other cases, the Federal Government intevened in state proceedings on state tax matters. In *Boyd*, Tennessee sales and contractor use taxes had been imposed on Carbide as a result of its contractual relationship with the United States. The Tennessee Supreme Court held that Carbide was an independent contractor in the general performance of its contract and not immune from taxation and that Carbide was liable for contractor use taxes. Similarly, the United States litigated suits in other state courts. *See, e.g., United States* v. *City of Detroit*, 355 U.S. 466 (1958); *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958); *United States* v. *County of Fresno*, 429 U.S. 452 (1977). These cases exemplify efficient and effective proceedings to resolve tax disputes between states and taxpayers in which the United States has an interest. In each case this Court noted probable jurisdiction and reviewed each decision on constitutional grounds.

The doctrine of abstention is a mechanism to resolve potential conflicts between the rights of a person or entity to appeal for adjudication in the federal courts and the rights of states to adjudicate matters peculiarly relevant to their interests. The Sixth Circuit's opinion asserts that the right of the United States to have its contract interpreted in a federal court is paramount to the right of the State of Tennessee to adjudicate a conflict centering on a possible real property interest of a federal contractor using Government property. With this opinion we respectfully disagree.

No case presents a clearer justification for abstention and dismissal than does the case at bar. The United States has sought to pursue litigation in two jurisdictions concurrently on the same tax matter. The fact that one suit is brought by the

contractor at the direction and with the funding of the United States and the other by the United States should not mask the primacy of the role of the United States. It is the United States that has directed Carbide to plead only state law defenses in the State court while the United States pleads state law defenses and federal defenses in the federal court. The suits deal with the same parties, and the same issues. The district court by abstaining and dismissing properly ruled that the suit should be tried in one jurisdiction and that the state tribunals were uniquely qualified to adjudicate these issues dealing with unsettled state law, state property tax assessment and valuation. The United States through its contractor has not exhausted state remedies and can itself still intervene in the state proceedings and plead any defense it deems appropriate. That it has until now refused to join in the state proceedings is a choice which should not affect the rulings of this Court. By following the course set by the district court in abstaining and dismissing, thereby referring the suit to the state courts, this case can be most advantageously advanced for final disposition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIV. 3-82-83

United States of America,

v.

Anderson County, Tennessee, Et. al.

MEMORANDUM

(Filed April 15, 1982)

Plaintiff brought this action to obtain a declaratory judgment that a real property tax assessed by Anderson County, Tennessee is unconstitutional. Defendants have moved the Court to abstain and to dismiss this case because a case involving the same issue is pending in the Davidson County, Tennessee Chancery Court.

Plaintiff first instituted this action on July 15, 1980. The issue in that suit and the present one is whether or not Anderson County may levy a real property tax on the interest of Union Carbide Corporation (Union Carbide), if any, in real property known as the Y-12 Plant located in Anderson County. The land and plant are owned by the United States. Union Carbide operates the plant under a contract with the United States. On July 23, 1980, the case was dismissed so that the United States and Union Carbide could present their claim to the Anderson County Board of Equalization. On September 30, 1980 the Anderson County Board of Equalization ruled that the property tax on Union Carbide's interest in the Y-12 Plant was legal and appraised that interest at $370,000,000. Union Carbide appealed the decision to the Assessment Appeals Commission which

reversed the Anderson County Board of Equalization, holding that Union Carbide had no taxable interest in the Y-12 Plant. On January 8, 1982 the State Board of Equalization reversed the Assessment Appeals Commission in a 4-3 decision. The State Board held that Union Carbide owned a real property interest in the Y-12 Plant and appraised that interest at $325,000,000. On February 12, 1982 the United States filed this action. On March 8, 1982, Union Carbide petitioned the Davidson County, Tennessee Chancery Court for review.

In *United States* v. *State of Ohio,* 614 F.2d 101 (6th Cir. 1979), the Court held that abstention was proper where government contractors challenged a state tax before the Ohio Board of Tax Appeals and the United States filed an action in federal district court challenging the same tax. The Court relied on the abstention doctrines set forth in *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941) and *Younger* v. *Harris,* 401 U.S. 37 (1971), and adopted the approach of the Second Circuit in *In the Matter of Levy,* 574 F.2d 128 (2nd Cir. 1978). There the Second Circuit held that a district court should not abstain in a case challenging state taxation if (1) there are no unsettled questions of state law which affect federal claims; (2) present state proceedings would not be interrupted by exercise of federal jurisdiction; (3) and the most important questions of law presented by the suit are federal, not state, questions. The Sixth Circuit concluded that none of the criteria was met in that case.

Plaintiff seeks to distinguish the *Ohio* case on the ground that there is no unsettled question of state law and by pointing out that in *Ohio* the United States' complaint asserted that the assessments involved were in violation of state laws. These distinctions are without merit. Union Carbide argues in its petition for review filed in the Chancery Court that the assessment is contrary to Tennessee law in that the Y-12 Plant is used for a public purpose and is, therefore, exempt from taxation pursuant to Tenn.Code Ann. § 67-501, and further that under Tennessee law it has no taxable interest in the Y-12 Plant. The issues

raised by Union Carbide are important ones and relate only to state law. The Sixth Circuit attached no significance to the fact that the Government relied only on Ohio law in its complaint. The Court recognized that the constitutionality of the state taxation was "bound to surface." 614 F.2d at 103. In the present case the United States raised the constitutional issue in its complaint.

None of the three criteria adopted by the Sixth Circuit indicates that abstention is improper in this case. The *Ohio* case, which is indistinguishable from the present case, compels that conclusion that abstention is proper. The reasons for abstention were succintly stated by the Court in *Ohio:*

> The possibility of friction between state and federal government could thus be avoided, and the district court would not be required to make a constitutional determination based on speculative interpretation of state law.

Id. at 104. Under the circumstances of this case, dismissal of the action is required. *Id.* at 105-06.

The United States will not be prejudiced by the Court's abstention in this case. The United States may seek to intervene in the state proceeding and the constitutionality of the taxation can be raised, either by Union Carbide or the United States. *Id.*

For the reasons stated, it is ORDERED that defendants' motion to abstain and to dismiss be, and the same hereby is, granted.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge

APPENDIX B

No. 82-5281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellant,

v.

Anderson County, Tennessee, et al.,
Defendants-Appellees.

On Appeal From the
United States District
Court for the Eastern
District of Tennessee.

Decided and Filed April 20, 1983

Before: Martin and Krupansky, Circuit Judges, and Pratt, District Judge.*

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* Honorable Philip Pratt, United States District Judge, Eastern District of Michigan, sitting by designation.

Krupansky, Circuit Judge. This is an action by the United States of America against Anderson County, Tennessee, and officers thereof, seeking a declaration that a tax imposed by Anderson County upon Union Carbide Corporation (Union Carbide), a government contractor, was in violation of Tennessee law and was unconstitutional and void as constituting a

discriminatory tax upon the United States and its contractor. The district court abstained citing to *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), as interpreted by this Circuit in *United States* v. *Ohio*, 614 F.2d 101 (6th Cir. 1979), and dismissed the cause of action.

The United States owns in fee simple the Oak Ridge Reservation, consisting of 37,185 acres of land situated in Anderson and Roane Counties, Tennessee, whereupon are located large federally owned and operated nuclear production and research facilities principally devoted to development of nuclear energy and production of nuclear weapon components for national defense. The Y-12 Plant, located in Anderson County on the Oak Ridge Reservation, is managed for the United States by Union Carbide pursuant to Government Contract No. W-7405-ENG-26 (contract). In return for managing the operation and maintaining the Government owned facilities, Union Carbide receives an annual fixed fee plus costs; the fee is unrelated to the value of the real and personal property managed or to the amount of weapon components produced. Union Carbide performs no work as a private enterpreneur on behalf of itself or any other private entity at the Y-12 Plant. All obligations and costs of operating the Y-12 Plant, including costs of materials and supplies procurred by Union Carbide, are liabilities of the United States. Union Carbide advances no funds nor does it commit any of its property to the management of the facility. Union Carbide is not liable for any loss, damage or destruction of government property at the Y-12 Plant absent willful mis-conduct, bad faith or failure to comply with written instructions. Union Carbide is not obligated to pay any rent, fee, charge, or other consideration in exchange for its presence at, and right of access to, the Y-12 Plant for the purpose of performing its duties under its management contract.

In March, 1980, Anderson County advised Union Carbide that an ad valorem tax would be assessed upon an alleged real property interest of Union Carbide in the federally owned Y-12 Plant facility. In July, 1980, the United States initiated an action in the United States District Court for the Eastern District of Tennessee challenging the tax assessment, whereupon the district court ordered the parties to pursue state administrative remedies and, upon exhaustion thereof, to reappear before the district court for appropriate relief if dissatisfied with the state agency decision.

A complaint was then filed by Union Carbide before the Anderson County Board of Equilization (County Board). However, the United States refused to submit to the jurisdiction of the state administrative agency to preserve its claim of sovereign immunity. In September, 1980, the County Board concluded that the imposed Tennessee tax was legal since no exemption had been procurred by the Division of Property Assessments, State of Tennessee, as required by T.C.A. § 67-801.

The decision of the County Board was appealed by Union Carbide to the Assessment Appeals Committee (Appeals Committee). In a 4:3 decision the latter Committee concluded that the contractual relationship between Union Carbide and the United States did not create a property interest in Union Carbide which was subject to taxation under the laws of Tennessee and the assessment was accordingly voided. The constitutionality of the tax was not addressed.

Anderson County filed a petition for review of the decision of the Appeals committee to the State Board of Equilization (State Board). Before the State Board rendered its decision, the district court dismissed the pending federal action without prejudice, noting that neither party had pursued its claim before the Court during the intervening 12 months from the date of its Order compelling the parties to seek state administrative relief. Ap-

proximately six months thereafter, the State Board in a 4:3 decision reversed the decision of the Appeals Committee declaring the tax assessment valid. It was adjudged that (1) Union Carbide was the owner of a real property interest as defined by T.C.A. § 67-601(1) to which a real property tax attached pursuant to T.C.A. §67-602(6), (2) Union Carbide was not exempt from taxation pursuant to T.C.A. § 67-501, which exempts "all property of the United States . . . used exclusively for public . . . purposes," and (3) Union Carbide assumed the status of an independent contractor and, consequently, the assessment was not an act of unconstitutional taxation against the United States.

Upon this pronouncement from the highest state agency, the United States reinstituted the instant action in the federal forum seeking a declaration that (1) the contract between Union Carbide and the United States neither conveyed nor created in Union Carbide any real property ownership and that the Board's interpretation of the contract was erroneous and (2) the attempted imposition of tax was unconstitutional because it constituted a discriminatory tax against the United States and was void since Union Carbide acquired no ownership interest at Y-12 as a result of its contract with the United States Government but only a privilege of access to the facility which was not taxable under the laws of Tennessee. Shortly thereafter, Union Carbide filed a petition to review the State Board's decision in the Davidson County Chancery Court. Within this procedural context, the district court exercised *Pullman* and *Younger* abstention and dismissed the federal action. This appeal ensued.

The Supreme Court has stated that judicially created doctrines of absention, whereby the federal forum may decline or postpone exercise of jurisdiction, are "extraordinary and narrow exception[s]to the duty [of the federal forum] to adjudicate [those] controvers[ies] properly" asserted. *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). The "virtually

unflagging obligation" of the federal forum to exercise its jurisdictional powers may be abdicated out of deference to parallel litigation in the state forum in only the most exceptional circumstances. *See: Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ____ U.S. ____, 103 S.Ct. 927, 935-39 (1983). The federal forum has, on numerous occasions, entertained, without discussing abstention, actions wherein the United States has challenged imposition of a state tax upon a federally owned facility or upon a federal contractor. *See e.g., United States* v. *New Mexico*, ____ U.S. ____, 102 S.Ct. 1373 (1982) (citing cases); *United States* v. *California State Board of Equilization*, 683 F.2d316 (9th Cir. 1982). Doctrines of abstention have been expressly rejected in such actions. *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971); *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d 677 (10th Cir. 1961). However, this Circuit has recognized, in an action distinguishable from the case at bar, that abstention may be appropriate in instances wherein the United States challenges assessment of a state tax upon its contractor. *United States* v. *Ohio*, 614 F.2d 101 (6th Cir. 1979).

Confronting the propriety of *Pullman* abstention in the action *sub judice*, it is noted that the doctrine applies

> in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.

Colorado River, supra, 424 U.S. at 814, 96 S.Ct. at 1244. *Accord: Hanna* v. *Toner*, 630 F.2d 442, 445 (6th Cir. 1980). *Pullman* abstention may be appropriate to moot a federal issue in the presence of some unsettled question of state law or when there is a need to interpret an ambiguous state statute. In *United States* v. *Ohio, supra*, this Court applied *Pullman* abstention in an action wherein governmental agencies had executed contracts with various private corporations. These agreements required the corporations to purchase, on behalf of the United

States, various items of personal property, title to which vested in the United States at the time of delivery to the contractors. The Tax Commission of Ohio levied sales and use tax assessments against the contractors, several of which challenged the tax before the Ohio Board of Tax Appeals. Shortly thereafter, and prior to any state administrative resolution, the United States initiated an action in district court seeking a declaration that the taxes were improper *under Ohio law, i.e.*, that Ohio had violated its own statutes by assessing the tax. Pertinently, the United States did not assert in its complaint that the assessments constituted unconstitutional taxation of the federal government. The district court ordered state proceedings stayed in aid of its federal jurisdiction and this Circuit reversed, observing that "the submerged question of the constitutionality of the state taxation was bound to surface in the course of [the federal] litigation," *id.* at 103, and adjudged that *Pullman* and *Younger* abstention were appropriate.

In *Ohio* the sole issue joined in the federal pleading challenged the statutory construction of Ohio taxing statutes. An interpretation of the relevant ambiguous legislative enactments by the state courts offered the opportunity of mooting any "submerged" and unplead constitutional claims. Contrawise, in the case at bar, unlike *Pullman* and *Ohio*, the relevant sections of the Tennessee Code Annotated are clear in imposing an ad valorem tax on real property interests and need no judicial construction. *Compare: United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971) (abstention deemed inappropriate where the state taxing statute was facially unambiguous irrespective of fact that said statute had never been construed by state courts); *United States* v. *Bureau of Revenue of State of New Mexico*, 291 F.2d 677, 679 (10th Cir. 1961) (abstention inappropriate where state taxing statute "is unambiguous and leaves no room for construction"). In *Ohio* this Circuit stated:

> We are in agreement with the recent ruling of the Second Circuit that a district court, confronted with a suit challenging state taxation, should not abstain from exercise of jurisdiction if (1) there are no unsettled questions of state law which affect federal claims; (2) present state proceedings would not be interrupted by exercise of federal jurisdiction; (3) and the most important questions of law presented by the suit are federal, not state, questions.

Ohio, supra, 614 F.2d at 105, citing *In re Levy,* 574 F.2d 128 (2d Cir. 1978). In the case at bar, consistent with the principles of *Ohio,* "there are no unsettled questions of state law which affect federal claims." *Id.* Rather, the "unsettled question" is whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant. A negative response to the inquiry vitiates the necessity of ascertaining the authority of the state of Tennessee to impose a tax upon Union Carbide. Further, interpretation of a contract wherein the United States is a party is a *federal* issue. *United States* v. *Allegheny County,* 322 U.S. 174, 64 S.Ct. 908 (1944).[1] Accordingly, abstention was inappropriate for two reasons: (1) there was no unsettled state question and, (2) "the most important questions of law presented by the suit [were] federal, not state, questions." Moreover, in the event that the district court should adjudge that Union Carbide's contractual relationship with the United States resulted in a real property interest which is taxable under

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[1] The Court stated:

> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (numerous citations omitted)

322 U.S. at 183, 64 S.Ct. at 913-14.

Tennessee statutes, then, in that event, the federal constitutional issues, predicated upon the Supremacy Clause, would be joined. These constitutional defenses are appropriate for disposition in the federal forum. In sum, since the threshold issue of contractual interpretation is federal, as are the ultimate constitutional challenges to the state taxation, and since the underlying state taxation statutes are not ambiguous, *Pullman* abstention is inappropriate.

Confronting the propriety of *Younger* abstention in the action *sub judice*, it is noted that the doctrine facially applies where (1) there is an ongoing or pending state proceeding, (2) the proceeding is criminal and (3) no unusual circumstances exist which would counsel against abstention, such as prosecution under a flagrantly unconstitutional statute, bad faith prosecution or an inability to raise the constitutional challenge in the state proceeding. The second prong of the *Younger* three-tier test has been expanded to warrant abstention in noncriminal judicial proceedings but only when "important state interests are involved." *Middlesex County Ethics Committee* v. *Garden State Bar Association* ___ U.S. ___, ___, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), citing *Moore* v. *Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979), *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604-05, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975). *See also: Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *J. P.* v. *DeSanti*, 653 F.2d 1080, 1082 (6th Cir. 1981). Assuming, without deciding, the existence of an ongoing or pending state proceeding even though the United States is not a party to the state proceedings and that the first prong of *Younger* has been satisfied, the criteria of the second prong of the test has not been fulfilled. Tennessee's interest in administering its own tax laws without federal intervention may qualify as an important state interest when a tax is assessed against an entity *other* than the United States. *See: Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Indeed, the Anti-Injunction Act, 28

U.S.C. § 1341 (1976),[2] implicitly recognizes this principle and preserves state fiscal integrity by precluding the federal forum from enjoining tax assessments where a state remedy exists. It is recognized that the Act "has its roots in equity practice," principles of federalism and was promulgated in recognition of the imperative need of state sovereigns to administer their own fiscal operations without interference. *See: Rosewell* v. *LaSalle National Bank,* ____ U.S. ____, 101 S.Ct. 1221, 1235 (1981). However, the Anti-Injunction Act does not restrict the *United States* from access to the federal forum when it seeks to assert its own interest or that of its instrumentalities. *Department of Employment* v. *United States,* 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed.2d 96 (1976); *United States* v. *Lewisburg Area School District,* 539 F.2d 301 (3d Cir. 1976); *United States* v. *Bureau of Revenue of New Mexico,* 291 F.2d 677 (10th Cir. 1961). A state may not, consistent with the Supremacy clause, impose a tax directly upon the United States. *United States* v. *New Mexico,* ____ U.S. ____, 102 S.Ct. 1373 (1982); *M'Culloch* v. *Maryland,* 4 Wheat. 316, 431, 4 L.Ed. 579 (1819). This immunity extends to private entities who "stand in the Government's shoes." *Id.* at ____, 102 S.Ct. at 1383, citing *City of Detroit* v. *Murray Corp.,* 355 U.S. 489, 503, 78 S.Ct. 458, 491 (1958). Also,

> [i]t remains true, of course, that state taxes on contractors are consitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities. *See United States* v. *County of Fresno,* 429 U.S. 452, 463 n.11, 464, 97 S.Ct. 699, 705 n.11, 705, 50 L.Ed.2d 683 (1977); *Moses Lake Homes, Inc.* v. *Grant County,* 365

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[2] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495, 78 S.Ct. 458, 461 2 L.Ed.2d 441 (1958).

United States v. *New Mexico, supra,* ____ U.S. at ____, note 11, 102 S.Ct. at 1383, note 11. In the case at bar the United States has challenged the tax assessment as violative of the Supremacy Clause. Tennessee's interest in obtaining a state forum to adjudicate, without federal intervention, the validity of a tax assessment against Union Carbide, a contractor of the United States, is at best concurrent with and at worst totally subservient to the coexisting interest of the United States to obtain a federal adjudication of the propriety and constitutionality of said tax. The principles of comity and federalism which underlie doctrines of abstention in general, and *Younger* abstention in particular, are absent in the case at bar.

As abstention is inappropriate, the judgment of the district court dismissing the cause of action is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX C

No. 82-5281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellant

v.

Anderson County, Tennessee,
et al.,
Defendants-Appellees

ORDER

(Filed June 10, 1983)

BEFORE: MARTIN and KRUPANSKY, Circuit Judges, and PRATT, District Judge*

Presently before the Court is a petition for rehearing. Upon due consideration, said petition is hereby DENIED.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

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* Hon. Philip Pratt, United States District Judge, Eastern District of Michigan, sitting by designation.

APPENDIX D

NO. 82-5281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellant,

v.

Anderson County, Tennessee, et. al.,
Defendants-Appellees.

ORDER
(Filed August 9, 1983)

BEFORE: MARTIN and KRUPANSKY, Circuit Judges, and PRATT, District Judge.*

Upon due consideration, the motion of Anderson County, Tennessee for a stay of mandate pending an application to the Supreme Court for a writ of certiorari is hereby DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Jr.
Clerk

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* The Hon. Philip Pratt, United States District Judge, Eastern District of Michigan, sitting by designation.

APPENDIX E

Relevant Sections From Tennessee Code Annotated

4-5-117. Judicial review — Petition — Interim relief — Record — New evidence — Scope of review. — (a) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition to rehear. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall

transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.
In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the mertis of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. [Acts 1974 (Adj. S.), ch. 725, § 17; 1975, ch. 370, §§ 6, 19; 1978 (Adj. S.), ch. 815, § 1; 1978 (Adj. S.), ch. 938, § 13; T.C.A., § 4-523.]

4-5-322. Judicial review. — (a) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon. Provided further, that a person who is aggrieved by a final decision of the department of human services in a contested case may file a petition for review in the chancery court located either in the county of the official residence of the commissioner or in the county in which any one or more of the petitioners reside. The time for filing a petition for review in a court as pro-

vided in this chapter shall not be extended because of the period of time alotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but it it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.
In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the merits of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record.

[Acts 1974 (Adj. S.), ch. 725, § 17; 1975, ch. 370, § 6; 1978 (Adj. S.), ch. 815, § 1; 1978 (Adj. S.), ch. 938, § 13; T.C.A., § 4-523; Acts 1980 (Adj. S.), ch. 478, § 1; T.C.A., § 4-5-117; Acts 1982 (Adj. S.) ch. 874, § 63.]

67-401. Property subject to tax generally. — All property, real and personal, shall be assessed for taxation for state, county and municipal purposes, except such as is declared exempt in §§ 67-501—67-518, or unless otherwise provided. [Acts 1973, ch. 226, § 5.]

67-501. Government property. — All property of the United States, all property of the state of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county or municipal purposes shall be exempt from taxation.

Provided, however, that all property of any educational institution owned, operated, or otherwise controlled by the state of Tennessee as trustee or otherwise, shall be exempt from taxation. [Acts 1973, ch. 226, § 5.]

67-601. Definitions. — For purposes of classification of property:

(1) "Real property" is hereby defined to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under § 67-612; or machinery and equipment affixed to realty (except as otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal.

(2) "Personal property" is hereby defined to include every species and character of property which is not classified as real property.

(3) "Tangible personal property" is hereby defined to include personal property such as goods, chattels, and other ar-

ticles of value which are capable of manual or physical possession, and certain machinery and equipment, separate and apart from any real property, and whose value is intrinsic to the article itself.

(4) "Commercial and industrial tangible personal property" is hereby defined to include personal property such as goods, chattels and other articles of value which are capable of manual or physical possession, and machinery and equipment which is (1) used essentially and principally for the commercial or industrial purposes or processes for which it is intended and (2) if affixed or attached to real property, can be detached without material injury to such real property.

(5) "All other tangible personal property" is hereby defined to include all tangible personal property, including that used in agriculture, except public utility tangible personal property and commercial industrial tangible personal property.

(6) "Intangible personal property" is hereby defined to include personal property such as money, any evidence of debt owed to a taxpayer, any evidence of ownership in a corporation or other business organization having multiple owners, and all other forms of property whose value is expressed in terms of what the property represents rather than its own intrinsic worth. Intangible personal property shall include all personal property not defined as tangible personal property.

(7) "Public utility property" is hereby defined to include all property of every kind, whether owned or leased, and used, or held for use, directly or indirectly in the operation of a public utility, which shall include but not necessarily be limited to the following business entities, whether corporate or otherwise: (1) railroad companies; (2) telephone, radio common carriers and telegraph companies; (3) passenger, sleeping, freight and private car companies which is hereby defined as any business, other than a railroad company, which owns, uses, furnishes, leases, rents or operates to, from, through, in or across this state or any

part thereof any kind of railroad car, including but not necessarily limited to, flat, tank, refrigerator, passenger, or similar type cars; (4) street car companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies; (11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) taxicab, transit and limousine companies; (13) commercial air carrier companies holding a certificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration, or any other federal or state regulatory agency; excepting those companies whose operations are solely chartered operations; and (14) water transportation carrier companies which operate boats and barges over the waterways of this state for hire and which hold a certificate of convenience and necessity as common carriers from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency.

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(9) "Residential property" is hereby defined to include all real property which is used, or held for use, for dwelling purposes and which contains not more than one rental unit. All real

property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(10) "Farm property" is hereby defined to include all real property which is used, or held for use, in agriculture, including, but not limited to, growing crops, pastures, orchards, nurseries, plants, trees, timber, raising livestock or poultry, or the production of raw dairy products, and acreage used for recreational purposes by clubs.

(11) "Moveable structure" is hereby defined to include any mobile home or such other moveable structure which is constructed as a trailer or semitrailer and designed to either be towed along the highways or to be parked off the highways, and which may be used, temporarily or permanently, as a residence, apartment, office, storehouse, warehouse or for any other commercial or industrial purpose; but shall not include self-propelled vehicles, sleeping and camping facilities attached to, or designed to be attached to, or drawn by a pick-up truck or an automobile, and which contains less than three hundred (300) square feet of inclosed space. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 467, §§ 2, 3.]

67-602. Place and function of assessment — person to whom assessed. — The function of assessment shall be as follows, to wit:

(1) To assess all property, except such property as shall be assessed by the Tennessee public service commission, to the person or persons owning or claiming to own the same on the first day of January for the year for which the assessment is made, if known and, if not, to unknown owners, provided that any temporary improvement, or moveable structures that are assessable under § 67-612, regardless of ownership, shall be assessed as real property as an improvement to the land where located.

(2) To assess the property held by executors and administrators in the county, district, or ward in which the decedent resided at the time of the death until such have been distributed; but if the deceased lived in another state, then the property shall be assessed where the personal representative resides.

(3) To assess personal property held by trustees and guardians of minors and lunatics to each guardian or trustee in the county, ward, or district where such minor, or lunatic resides, if a resident of the state; and if a nonresident, then in the county, ward or civil district in which the guardian or trustee resides; provided, that guardian held property shall be assessed in the county where the guardian having control thereof renders his annual settlement.

(4) The property of all street railroad, gas, electric light companies and other public utility companies, including their franchises used within any town, city or taxing district where the office of the company is located outside of such incorporated city or town or taxing district, but with the main property within the city, shall be taxed in the city, town, or taxing district as if the office was situated within the city limits, and the property, including franchises of the corporations and joint-stock companies that lie wholly or mainly within any incorporated city, taxing district, or town, or whose chief business is within any incorporated city, taxing district, or town shall be assessed for taxation in such city, taxing district, or town; provided, that all real property and tangible personal property shall be taxed in the district where situated; and provided further that public utility property of every kind (real property, tangible personal property, and intangible personal property) shall all be assessed for taxes at fifty-five per cent (55%) of its value.

(5) Leased personal property used by a public utility company shall be assessed to the public utility company.

(6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property. [Acts 1973, ch. 226, § 6.]

67-606. Basis of valuation. — The value of all property shall be ascertained from the evidence of its sound, intrinsic and immediate value, for purposes of sale between a willing seller and a willing buyer without consideration of speculative values, and when appropriate subject to the provisions of the Agricultural, Forest, and Open Space Land Act of 1976, codified in §§ 67-650 — 67-658.

In determining the value of all property of every kind, the assessor shall be guided by, and follow the instructions, of the appropriate assessment manuals issued by the state division of property assessments and approved by the state board of equalization.

For determining the value of real property, such manuals shall provide for consideration of the following factors:

(1) location;

(2) current use;

(3) whether income bearing or nonincome bearing;

(4) zoning restrictions on use;

(5) legal restrictions on use;

(6) availability of water, electricity, gas, sewers, street lighting, and other municipal services;

(7) natural productivity of the soil, except that the value of growing crops shall not be added to the value of the land; and

(8) all other factors and evidence of values generally recognized by appraisers as bearing on the sound, intrinsic and immediate economic value at the time of assessment.

For determining the value of industrial, commercial, farm machinery and other personal property, such manuals shall provide for consideration of the following factors:

(1) current use;

(2) depreciated value;

(3) actual value after allowance for obsolescence;

(4) all other factors and evidences of values generally recognized by appraisers as bearing on the sound, intrinsic and immediate economic value at the time of assessment.

(5) Notwithstanding the foregoing, all farm personal property and also all household and kitchen furniture, tableware, musical instruments, wearing apparel, private passenger motor vehicles, jewelry and other personal property of similar character used in the taxpayer's own household, together with all intangible property, including bank accounts, of the taxpayer, may be assumed prima facie by the assessor of property to be of a value not in excess of seven thousand five hundred dollars ($7,500) per individual and fifteen thousand dollars ($15,000) for jointly owned property held by husband and wife in the absence of any tax return or schedule to the contrary.

It is the legislative intent hereby declared that no appraisal hereunder shall be inflated values resulting from speculative purchases in particular areas in anticipation of uncertain future real estate markets; but all property of every kind shall be appraised according to its sound, intrinsic and immediate economic value which shall be ascertained in accordance with

such official assessment manuals as may be promulgated and issued by the state division of property assessments and approved by the state board of equalizan pursuant to law.

Provided, that if the tax computed on an erroneous basis of valuation or assessment has been paid prior to certification of the corrected assessment by the assessor, the trustee or municipal collector shall, within sixty (60) days after receipt of such certification from the assessor, refund to the taxpayer that portion of such tax paid which resulted from the erroneous assessment, such refund to be made without the necessity of payment under protest or such other requirements as usually pertain to refunds of taxes unjustly or illegally collected. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 771, § 8; 1976 (Adj. S.), ch. 782, § 13; 1977, ch. 262, § 1.]

67-831. Jurisdiction and duties of state board — Assessment appeals commission powers and duties. — (a) The state board of equalization shall have jurisdiction over the valuation, classification and assessment of all properties in the state. Said board shall have and perform the following duties:

(1) Receive, hear, consider, and act upon complaints and appeals made to the board;

(2) Hear and determine complaints and appeals made to the board concerning exemption of property from taxation;

(3) Take whatever steps it deems are necessary to effect the equalization of assessments, in any taxing jurisdiction within the state in accordance with the laws of the state; and

(4) Carry out such other duties as are required by law.

(b) In addition to the powers and duties conferred upon the state board of equalization by subsection (a) of this section or any other provision of this code, the state board of equalization may by resolution create an assessment appeals commission consisting of not less than three (3) nor more than five (5)

members, and may delegate to such assessment appeals commission the jurisdiction and duties conferred by law upon the state board of equalization to hear and act upon all complaints and appeals regarding the assessment, classification and value of property for purposes of taxation, including, but not limited to, complaints and appeals from assessments made by the Tennessee public service commission, complaints and appeals from actions of local boards of equalization, complaints and appeals concerning exemption of property from taxation, complaints and appeals from assessments made by the division of property assessments, and complaints and appeals concerning the valuation of property for inheritance tax purposes. The assessment appeals commission authorized by this subsection (b) shall be composed and shall function as follows:

(1) The members of the assessment appeals commission shall be appointed by the state board of equalization. Persons who may be appointed to the assessment appeals commission shall be residents of the state and at least eighteen (18) years of age. Members of the state board of equalization, the executive secretary of the state board of equalization, the director of the division of property assessment and local and state officials shall not be precluded from appointment to the said assessment appeals commission by virtue of their positions. At least one (1) of the members shall be a person other than a full time state official.

(2) The state board of equalization shall designate the chairman of the assessment appeals commission.

(3) The members of the assessment appeals commission shall take office for a term of one (1) year and until their successors shall take office.

(4) In the event that there is a vacancy in the membership of the assessment appeals commission, the state board of equalization shall fill the vacancy in the same manner as initial appointments.

(5) The assessment appeals commission shall meet at the call of the executive secretary to the state board of equalization. A majority of the members of the assessment appeals commission shall constitute a quorum.

(6) The asessment appeals commission shall follow such rules and regulations of practice and procedure which may be promulgated by the state board of equalization.

(7) It shall be the duty of the members to discharge the duties of the assessment appeals commission without compensation except that persons who are not officials of the state of Tennessee, who may from time to time serve as members of the assessment appeals commission shall be paid at the rate of fifty dollars ($50.00) per day for each day or part of a day in attendance at meetings of the assessment appeals commission. The members, whether or not they are state officials, shall be reimbursed necessary travel and per diem expenses as prescribed in comprehensive travel regulations by the commissioner of finance and administration for employees of the state of Tennessee, during such service on the assessment appeals commission.

(8) At any time prior to, during or after any proceeding before the assessment appeals commission, authorized by this subsectin (b), it may certify a question to the state board of equalization if such question is determinitive or partially determinative of the proceeding and if such question is found by the assessment appeals commission to be a matter of policy to be determined by the state board of equalization. Proceedings before the assessment appeals commission may be suspended pending the determination of the question certified to the state board of equalization.

(9) Actions taken by the assessment appeals commission shall be final as if the actions were taken by the state board of equalization; provided, however, that the state board of equalization may, in its sole discretion, within forty-five (45)

days of any final action taken by the assessment appeals commission, enter an order requiring a review of the action of the assessment appeals commission by the state board of equalization, in which the action shall not become final until the state board of equalization has rendered its final decision in the matter. A party desiring the state board of equalization to review an action of the assessment appeals commission must file a written petition with the executive secretary to the state board of equalization within fifteen (15) days of that action of the assessment appeals commission. The above shall not be construed to limit in any way the authority of the state board of equalization to order a review upon its own motion within forty-five (45) days of an action of the assessment appeals commission. In the event that the state board of equalization does exercise its discretion to review any action of the assessment appeals commission, said review may be upon the record before the assessment appeals commission or in such manner as the state board shall direct.

(10) If the state board of equalization shall not exercise its discretion to review a matter heard by the assessment appeals commission, the assessment appeals commission shall issue a certificate of assessment or other final certificate of its actions, which certificate shall be subject to judicial review in the same manner as are final actions of the state board of equalization.

(11) The assessment appeals commission shall prepare and maintain records of its proceedings in the form of minutes. The said minutes, together with all other papers and records of the assessment appeals commission, shall be kept and maintained in the office of the executive secretary to the state board of equalization. [Acts 1973, ch. 226, § 10; 1975, ch. 171 § 1; 1979, ch. 64, §§ 1, 2; 1980 (Adj. S.), ch. 467, § 1.]

67-1805. Fee exempt from tax on leasehold.— Where there is assessable under the law a leasehold interest in real estate or any improvements on real estate, which said real estate is exempt from taxation in the hands of and to the owner thereof, the

taxes assessed against such leasehold interest or interest in improvements on such exempt real estate shall be a lien only upon such leasehold interest or interest in improvements, and not upon the interest of the owner of the fee or the remainder or reversion of the fee. [Acts 1907, ch. 602, § 31; Shan., § 758a3; Code 1932, § 1333.]

APPENDIX F

Relevant Section From United States Code

28 U.S.C. § 1341

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

APPENDIX G

Excerpt From State Of Tennessee Assessors Manual
Pages Ap-10 and Ap-11

REAL ESTATE VS REAL PROPERTY

Generally, the term real estate refers to the physical land and appurtenances, including structures affixed thereto. The legal concept of real estate implies that land includes not only the ground or soil, but everything which is attached to the earth, whether by course of nature, as trees and herbage, or by the hand of man, as houses and other buildings. It includes not only the surface of the earth, but everything under it and over it to the extent necessary for the full enjoyment and exploitation of the property.

The term real property refers to the interest, benefits, and rights inherent in the ownership of the physical real estate.

The benefits of ownership are derived from the Bundle of Rights Theory, which claims that the owner has the right to use the real estate, to sell it, to lease it, to enter it, or give it away as he so desires. These rights are guaranteed by law, but they are subject to the following governmental restrictions: (1) Taxation; (2) Eminent Domain - the taking by condemnation of private property for public use, providing the owner receives just compensation therefor; (3) Police Power - the regulation of property use for promoting the public's health, safety, morals and general welfare (4) Escheat - provision for the reversion of ownership to the State if the owner does not pay his taxes or if he dies leaving no will and no known or ascertainable heirs.

Private restrictions can also affect value. These normally take the form of deed restrictions but may also include easements, rights of way, etc.

For purposes of this manual, the terms real estate and real property are used interchangeably, and the sample appraisals assume the property is owned in "fee simple," which is the highest estate of ownership and infers the entire bundle of rights is intact.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

CIV. 3-80-303

United States of America

v.

Anderson County, Tennessee, et al

ORDER

(Filed July 23, 1980)

The parties in this case will appear before the County Equalization Board for determination of the issues involved. After that, either side may go to the State Equalization Board. When the State Equalization Board resolves the issues, and if either side is dissatisfied, that side will immediately appear before the Court and ask for the appropriate relief.

Enter:

/s/ Robert Taylor
United States District Judge

APPENDIX I

Excerpts From Contract No. W-7405-ENG-26

ARTICLE XXIV - STATE AND LOCAL TAXES

(a) The Corporation agrees to notify DOE of any State or local tax, fee, or charge levied or purported to be levied on or collected from the Corporation with respect to the contract work, any transaction thereunder, or property in the custody or control of the Corporation and constituting an allowable item of cost if due and payable, but which the Corporation has reason to believe, or DOE has advised the Corporation, is or may be inapplicable or invalid; and the Corporation further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by DOE. Any State or local tax, fee, or charge paid with the approval of DOE or on the basis of advice from DOE that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The Corporation agrees to take such action as may be required or approved by DOE to cause any State or local tax, fee, or charge referred to above to be paid under protest and to take such actions as may be required or approved by DOE to seek recovery of any payment made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the Corporation in any proceeding for the recovery thereof or to sue for recovery in the name of the Corporation. If DOE directs the Corporation to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the Corporation for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall

apply and the costs and expenses incurred by the Corporation shall be allowable items of cost, as provided in this contract, together with the amount of any judgment rendered against the Corporation.

(c) The Government shall save the Corporation harmless from penalties and interest incurred through compliance with this article. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

ARTICLE XVIII - **LITIGATION AND CLAIMS**

(a) **Initiation of Litigation.** The Corporation may, with the prior written authorization of the Contracting Officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The Corporation shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(b) **Defense and Settlement of Claims.** The Corporation shall give the Contracting Officer immediate notice in writing (1) of any action, including any proceeding before an administrative agency, filed against the Corporation arising out of the performance of this contract, and (2) of any claim against the Corporation the cost and expense of which is allowable under any provision of this contract. Except as otherwise directed by the Contracting Officer, in writing, the Corporation shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Corporation with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Corporation may with the Contracting Officer's approval settle any such action or claim, shall effect at the Contracting Officer's request an assignment and subrogation in favor of the Government of all the Corporation's rights and claims (except those against the Government) arising out of

any such action or claim against the Corporation, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the Corporation in, or to take charge of, any action. If the settlement or defense of an action or claim against the Corporation is undertaken by the Government, the Corporation shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Corporation is not covered by a policy of insurance, the Corporation shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith; and in such event the defense of the action shall be at the expense of the Government: **Provided, however,** That the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the Corporation failed to secure through its own fault or negligence.

APPENDIX J

MCF:JJMcC: CEStratton:pjc
236517-44-44
CMN: 8014328

Washington, D.C. 20530

August 28, 1980

Anderson County Board of Equalization
c/o Anderson County Tax Assessor's Office
Anderson County Courthouse
100 Main Street
Clinton, Tennessee 37716

Re: Objection and Appeal to the Anderson County Board of Equalization Regarding Tennessee Tax Assessment Issued To Union Carbide Corporation With Respect To Real Property Owned by the United States of America (Y-12 Nuclear Weapons Plant)

Dear Sir:

By reason of the July 23, 1980 Order of the Honorable Robert Taylor, United States District Judge, United States District Court for the Eastern District of Tennessee, Northern Division, the United States of America hereby serves this objection on the Anderson County Board of Equalization and appeals to said Board that the Anderson County real property ad valorem assesment issued against the Union Carbide Corp., with respect to the real property of the United States known as the Y-12 Nuclear Weapons Plant, be declared and found to be invalid and, alternatively, excessive. The United States reserves its rights to litigate its federal claims in the Federal Courts and fully intends to do so. In addition, insofar as the United States is able to do so, it will require its contractor, Union Carbide Corp., to litigate any federal claims in the Federal Courts. This objection and appeal is made upon the following grounds:

STATE LAW GROUNDS

(1) Tennessee law does not allow real property ad valorem tax assessments against persons or corporations with no ownership interests in such real property and Union Carbide Corp. has no ownership interest in the United States Government's Y-12 Nuclear Weapons Plant.

(2) The real property owned by the United States (the Government's Y-12 Nuclear Weapons Plant), which is the basis of the real property assessment against Union Carbide Corp., is used for public purposes, and is therefore exempt under the provisions of Section 67-501, Tennessee Code annotated.

(3) The subject assessment is excessive.

FEDERAL LAW GROUNDS

(4) The real property tax assessment presently issued against Union Carbide Corp. is in violation of the Federal Constitution because it is in reality an illegal attempt by Anderson County to tax property owned by the United States, rather than an attempt to lawfully tax any possible limited "interest" in or "use" of United States Government property.

(See discussion *United States* v. *State of Colorado,* CCH Colorado State Tax Reporter, Paragraph 200-151 — the County attorney, Mike Lawson has a copy of this opinion.)

(5) The real property tax assessment issued against Union Carbide Corp. is unconstitutional because it discriminates against the United States and its federal contractor in that (1) Section 7-53-305, Tennessee Code annotated exempts the property of municipalities & counties in Tennessee, but not the property of the United States and (2) property owned by others similarly situated is not treated the same as the subject property.

Please take notice that the United States will appear at the September 8, 1980 hearing that you scheduled (or any other scheduled hearing) with regard to this subject to discuss this protest and to assist you in arriving at a correct decision. The United States will be represented by attorneys from the Tax Division of the United States Department of Justice and attorneys from the Department of Energy. If you need any information, have questions or wish to discuss this matter prior to the hearing, please contact Charles E. Stratton of this office at (202) 724-6562.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: /s/ JOHN J. McCARTHY
Chief
Special Litigation

cc: Mike Lawson, Esquire
Anderson County Attorney
226 North Main Street
Clinton, Tennessee 37716

John H. Cary, Esquire
United States Attorney
P.O. Box 872
Knoxville, Tennessee 37901
Attention: Jimmie Baxter, Esquire
Assistant United States Attorney

Richard A. Correa, Esquire
U. S. Department of Energy
Room 6B222, Forrestal Building
Washington, D. C. 20585

William Snyder, Esquire
Office of Chief Counsel
U. S. Department of Energy
P.O. Box E
Oak Ridge, Tennessee 37830

Jackson C. Kramer, Esquire
David L. Oakley, Esquire
KRAMER, JOHNSON, RAYSON,
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United American Plaza
Knoxville, Tennessee 37929

G. Wilson Horde, Esquire
Division Counsel
Union Carbide Corporation
Box Y
Oak Ridge, Tennessee 37830

APPENDIX K

MCF:JJMcC: CEStratton:pjc
236517-44-44
CMN: 8014328

Washington, D.C. 20530

January 13, 1981

Mr. Jerry C. Shelton
Executive Secretary
State Board of Equalization
State of Tennessee
289 Plus Park Boulevard
Nashville, Tennessee 37217

Re: Complaint, Objection and Appeal to the Tennessee State Board of Equalization Regarding the Anderson County Tennessee Tax Assessment Issued Against Union Carbide Corporation With Respect To Real Property Owned by the United States of America (Y-12 Nuclear Weapons Plant) (described as Parcel 702, District 2, Map p-14, Anderson County)

Dear Mr. Shelton:

By reason of the July 23, 1980 Order of the Honorable Robert Taylor, United States District Judge, United States District Court for the Eastern District of Tennessee, Northern Division, in the case of *United States* v. *Anderson County Tennessee, et al.*, Civil No. 3-80-303 (USDC ED Tenn., P. Div.), regarding the above-described Anderson County Tax Assessment, and because of the Sept. 30, 1980 erroneous decision made by the Anderson County Board of Equalization, the United States of America hereby serves this complaint, objection, and appeal on the Tennessee State Board of Equalization; the Anderson County real property ad valorem assessment issued against the Union Carbide Corp. with respect to the real property of the United States known as the Y-12 Nuclear Weapons Plant should be declared and found to be illegal, invalid, and, alternatively, ex-

cessive and the Anderson County Board's September 30, 1980 decision (or assessment, should be declared erroneous and overturned. The United States reserves its rights to litigate its federal claims in the Federal Courts and fully intends to do so. In addition, insofar as the United States is able to do so, it will require its contractor, Union Carbide Corp., to litigate any federal claims in the Federal Courts. This objection and appeal is made upon the following grounds:

STATE LAW GROUNDS

(1) Tennessee law does not provide for real property ad valorem tax assessments against persons or corporations with no ownership interests in real property. Union Carbide Corp. has no ownership interest, including no leasehold interest, in the United States Government's Y-12 Nuclear Weapons Plant; Union Carbide Corp. has only a right of access to the Government's real property as the Government's contractor.

(2) The real property owned by the United States (the Government's Y-12 Nuclear Weapons Plant), which is the basis of the real property assessment against Union Carbide Corp., is used for public purposes, and is therefore exempt under the provisions of Section 67-501, Tennessee Code annotated.

(3) The subject assessment is excessive.

FEDERAL LAW GROUNDS

District Judge Robert Taylor indicated that he desired action by the Anderson County Board of Equalization and the Tennessee State Board of Equalization before he would decide the Federal issues raised by the Federal Government in the abovementioned Federal Court action. (The following description of Federal law grounds is given for the sole purpose of putting the Tennessee State Board of Equalization on notice of the Federal law grounds that the Government intends to pursue in Federal

Court. The Government does not ask the Board, and believes the Board has no authority, to rule on the Federal law questions).

(1) The real property tax assessment presently issued against Union Carbide Corp. is in violation of the Federal Constitution because it is in reality an illegal attempt by Anderson County to tax property owned by the United States, rather than an attempt to lawfully tax any possible limited "interest" in or "use" of United States Government property. (See discussion *United States* v. *State of Colorado,* CCH Colorado State Tax Reporter, Paragraph 200-151; presently on appeal to the United States Supreme Court.)

(2) The real property tax assessment issued against Union Carbide Corp. is unconstitutional because it discriminates against the United States and its federal contractor in that (A) Section 7-53-305, Tennessee Code annotated exempts the property of municipalities & counties in Tennessee, but not the property of the United States and (B) property owned by others similarly situated is not treated the same as the subject property.

Please take notice that the United States will appear at the hearing that is tentatively scheduled for the week of February 23, 1981 (or any other scheduled hearing) with regard to this subject, to discuss this and to assist the Board with any information that it may need. The United States will be represented by attorneys from the Tax Division of the United States Department of Justice, attorneys from the Department of Energy, and possibly a representative from the United States Attorney's Office. If you need any information, have questions or wish to discuss this matter prior to the hearing, please contact Charles E. Stratton of this office at (202) 724-6430.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: JOHN J. McCARTHY
Chief
Special Litigation

cc: Mike Lawson, Esquire
Anderson County Attorney
226 North Main Street
Clinton, Tennessee 37716

John H. Cary, Esquire
United States Attorney
P.O. Box 872
Knoxville, Tennessee 37901
Attention: Jimmie Baxter, Esquire
Assistant United States Attorney

Richard A. Correa, Esquire
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Washington, D. C. 20585

William Snyder, Esquire
Chief Counsel, Oak Ridge Operations Office
U. S. Department of Energy
P.O. Box E
Oak Ridge, Tennessee 37830

Jackson C. Kramer, Esquire
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KRAMER, JOHNSON, RAYSON,
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G. Wilson Horde, Esquire
Division Counsel
Union Carbide Corporation
Box Y
Oak Ridge, Tennessee 37830

John Keto, Esquire
918 16th Street, N.W.
Suite 200
Washington, D.C. 20006

APPENDIX L

U.S. Department of Justice
Tax Division

JFM:JJMcC: CEStratton:pjc
236517-44-44
CMN: 8014328

Washington, D.C. 20530

January 28, 1981

Mr. Jerry C. Shelton
Executive Secretary
State Board of Equalization
State of Tennessee
James K. Polk Office Building
505 Dedrick Street
Nashville, Tennessee 37219

Re: Addendum To Complaint, Objection and Appeal to the Tennessee State Board of Equalization Regarding the Anderson County, Tennessee, Tax Assessment Issued Against Union Carbide Corporation With Respect To Real Property Owned by the United States of America (Y-12 Nuclear Weapons Plant) (Described As Parcel 702, District 2, Map P-14, Anderson County)

Dear Mr. Shelton:

This letter is intended to clarify questions raised concerning the position of the United States in the matter of the appeal by Union Carbide Corporation to the State Board of Equalization of the Anderson County, Tennessee, tax assessment issued against it. Although our January 13, 1981, letter to you is styled "Complaint, Objection and Appeal . . .", the United States does not want to become a party to this action or be joined with Union Carbide Corporation as co-appellant before the State Board of Equalization. The United States is not submitting to

the jurisdiction of the State Board of Equalization, nor waiving its sovereign immunity in any manner. The reason for our January 13, 1981, letter to you and our appearance at the February 24, 1981, hearing, as explained more fully in the first paragraph of that letter, is that the Federal District Court, Judge Taylor presiding, requested this matter be brought to the attention of the Anderson County Board of Equalization and the State Board of Equalization before the Federal Court passed on this matter. Accordingly, the United States has and is making its position known to this Board and will continue to assist this Board with any factual information that it may need before proceeding further in the Federal District Court. A copy of Judge Taylor's July 23, 1980 Order is attached to this letter for the convenience of the Board.

Sincerely yours,

JOHN F. MURRAY
Acting Assistant Attorney General
Tax Division

By: JOHN J. McCARTHY
Chief
Special Litigation

cc: Mike Lawson, Esquire
Anderson County Attorney
226 North Main Street
Clinton, Tennessee 37716

John H. Cary, Esquire
United States Attorney
P.O. Box 872
Knoxville, Tennessee 37901
Attention: Jimmie Baxter, Esquire
Assistant United States Attorney

Richard A. Correa, Esquire
U. S. Department of Energy
Mail Station 6F094
Forrestal Building
1000 Independence Avenue
Washington, D. C. 20585

William Snyder, Esquire
Chief Counsel, Oak Ridge Operations Office
U. S. Department of Energy
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Oak Ridge, Tennessee 37830

John Keto, Esquire
918 16th Street, N.W.
Suite 200
Washington, D.C. 20006

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION NO. 3-82-83

United States of America,
Plaintiff

v.

Anderson County, Tennessee;
David O. Bolling, Anderson
County Executive; Patsy Stair,
Anderson County Trustee;
Owen Richardson, Anderson
County Property Assessor;
Clyde Clairborne, Robert
Jolley, Jerry George, Everett
Sharp, Charlotte Hayes, Helen
Norman, Ernie Phillips, Q. V.
Leinart, Kenneth Wallace,
Darell Copeland, Jim Hackworth,
Jack Keeney, and Jack Rains,
County Commissioners of
Anderson County; Charles Oldham,
K. E. Jones, R. R. Tippy, Harry
Young and Tom F. Mullinix, The
Anderson County Board of
Equalization; The Board Of
Equalization Of The State Of
Tennessee, and its members,

Lamar Alexander, Gentry Crowell,
William C. Koch, Jr., William
Snodgrass, Harlan Matthews,
Claude Ramsey, Martha Olsen,
and John E. Sloan, Jr.,
Defendants

COMPLAINT FOR A DECLARATORY JUDGMENT

(Filed Feb. 12, 1982)

The plaintiff, United States of America, by and through its undersigned attorneys, complains and alleges as follows:

1. This is a civil action instituted by the United States of America for the purpose of obtaining a declaratory judgment that (a) the contract between the United States and Union Carbide Corporation creates in or conveys to Union Carbide no real property ownership interest or leasehold interest in the United States' plants and facilities in Tennessee which are managed by Union Carbide Corporation; and (b) that the defendants are prohibited from imposing ad valorem real property taxes on or with respect to the real property of the United States on which is situated the Y-12 nuclear weapons plant because all real property ownership interests in the plant are owned by and are titled in the United States, and the imposition of any such ad valorem real property taxes on said property would constitute taxation on property of the United States in violation of the Consitution of the United States; and (c) that the recent decision issued by the Tennessee State Board of Equalization declaring Union Carbide to have an interest in the real property on which is situated the United States' Y-12 nuclear weapons plant is erroneous, illegal, null and void.

2. This action is commenced at the request of the plaintiff's Department of Energy (hereinafter "DOE"), is under the direction of the Attorney General of the United States and is brought to vindicate the sovereign rights and pecuniary interests of the United States.

3. This Court has jurisdiction over this action under Sections 1331, 1345 and 2201 of Title 28, United States Code, because this action is brought by the United States, involves a controversy which exceeds $10,000.00, in amount exclusive of interest and costs, and arises under the United States Constitution.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States and the defendants concerning their respective rights and claims.

5. The plaintiff, United States of America, is a corporate sovereign and body politic.

6. The defendant, Anderson County, Tennessee, is a corporate body politic, is a governmental subdivision of the State of Tennessee and is within the jurisdiction of this Court.

7. The defendant, County Executive of Anderson County, Tennessee, is the chief accounting and financial officer of the County, and is charged by Tennessee law with the responsibility of assuring that all taxes due the County are collected.

8. The defendant, County Trustee of Anderson County, is charged by Tennessee law with the specific responsibility of collecting the taxes in dispute in this action.

9. The defendant, Property Assessor of Anderson County, acting under color of Tennessee law, issued an assessment with respect to real property of the United States located in Anderson County.

10. The defendant, County Commissioners of Anderson County, is the legislative body of Anderson County. Under Tennessee law, the County Commissioners are charged with the responsiblity of overseeing the tax collection activities of the County Executive and providing for the collection of taxes at the rates and in the manner authorized by law and set by them.

11. The defendant, Anderson County Board of Equalization, is charged with the responsibility of taking action on complaints

made by those receiving real property tax assessments in Anderson County and making final decisions pertaining to such complaints that are reviewable by the State Board of Equalization.

12. The defendant, State Board of Equalization of the State of Tennessee, and its members, Lamar Alexander, Gentry Crowell, William C. Koch, Jr., William Snodgrass, Harlan Matthews, Claude Ramsey, Martha Olsen, and John E. Sloan, Jr., sued herein solely in their official capacities as members of the Board of Equalization, are charged with the responsibility of making the final administrative decision of the State of Tennessee with respect to complaints concerning classification, valuation and assessment of real property in Tennessee.

13.The United States, through the DOE, owns 37,185 acres of land spread over Anderson and Roane Counties, Tennessee, known as the Oak Ridge Reservation, on which large Government-owned production and research facilities exist. The Oak Ridge Reservation was acquired by the United States in 1943 and its facilities have been in operation since World War II, performing functions related primarily to the development of nuclear energy and to the production of nuclear weapon components for national defense. The principal facilities on the Oak Ridge Reservation are the Y-12 nuclear weapons plant (hereinafter "Y-12 Plant"), located in Anderson County, the Oak Ridge National Laboratory and the Oak Ridge Gaseous Diffusion Plant, both of which are located in Roane County.

14. The United States Government facility which is the subject of this action is the Y-12 Plant, which is dedicated primarily to the production of nuclear weapon components. At the present time, the portion of the Government's Oak Ridge Reservation comprising the Y-12 Plant in Anderson County consists of approximately 811 acres of land and approximately 300 buildings and structures, all of which are owned in fee simple by the United States.

15. The total Government real property and associated equipment at the Y-12 Plant are presently valued on the Government's books as follows:

Acquisition Value	$656,095,000.00
Depreciated Value	$275,308,000.00

16. The Y-12 Plant, two other plants located on the Oak Ridge Reservation which are situated in Roane County, Tennessee, and one plant located in Kentucky are managed for the United States' DOE by the Union Carbide Corporation (hereinafter sometimes referred to as "Carbide") under Contract No. W-7405-ENG-26. This contract which was originally executed in 1943, with a term of several years, has been reexecuted and renewed every three to five years since 1943, and expires on September 30, 1983, unless extended. The current contract in effect today is designated Modification No. A057 of Contract No. W-77405-ENG-26 and is operative for the period October 1, 1978 through September 30, 1983. Under this contract, Union Carbide Corporation manages the United States' Y-12 Plant under Government direction, and performs work and services for the Government.

17. Modification No. A057 to Contract No. W-7405-ENG-26 defines and controls the activities which Carbide performs for the United States at the DOE Y-12 Plant and the relationship between DOE and Union Carbide Corporation. Carbide performs no work at the DOE Y-12 Plant other than that performed for the United States Government (DOE) pursuant to Modification No. A057 of Contract No. W-7405-ENG-26. No part of the Y-12 Plant or equipment located therein is utilized for any work done by Carbide for its own account or as a private entrepreneur. The declaration of R. J. Hart and Modification No. A057 to Contract No. W-7405-ENG-26 are attached hereto as *Exhibit A*.

18. Modification No. A057 to Contract No. W-7405-ENG-26 defines and controls Carbide's type of "use" of or "interest" in

the United States' Y-12 Plant. At all times, title to the land on which the Y-12 Plant is located, title to all the buildings that comprise the Y-12 Plant, and title to all the equipment and supplies used at the Y-12 Plant have been and remain in the United States Government. Neither Modification No. A057 to Contract No. W-7405-ENG-26 nor any other agreement, oral or written, nor any deed, lease, conveyance, license, nor any other document confers or purports to confer upon Carbide any estate, leasehold, license, permit, or any other right, title or interest in or to the Y-12 Plant or any portion thereof.

19. Carbide does not pay and is not obligated to pay any rent, fee, charge, or other consideration, in exchange for its presence or activities at the Y-12 Plant. Union Carbide Corporation does not own, or have any interest in, the real or personal property at the Y-12 Plant to perform its duties pursuant to Modification No. A057 to Contract No. W-7405-ENG-26.

20. Neither Modification No. A057 to Contract W-7405-ENG-26 nor any other document provides for or contemplates the sale by Union Carbide Corporation or the purchase by the United States of the product of the Y-12 Plant or any other product or commodity. The product manufactured at, along with everything else in, the Y-12 Plant, is at all times owned by and controlled by the United States.

21. Under the said contract between the United States and Union Carbide no funds of Union Carbide are to be used in any manner with respect to the Y-12 Plant. Expenses of operating the Y-12 Plant are paid by drafts drawn on the United States' funds on deposit in a United States owned bank account. Under this contract with the United States, Union Carbide Corporation is obligated to manage, staff, maintain, and operate the Y-12 Plant within the limits of available Government funds and as directed by the United States. Pursuant Modification No. A057 to Contract W-7405-ENG-26, the tax which is the subject of this suit, if paid, would be paid directly from the funds of the United States.

22. For its services under the said contract, Union Carbide Corporation is paid a fixed management fee annually. In Fiscal Year 1982, Carbide will receive a total fee of $8 million for its services under Modification No. A057 to Contract W-7405-ENG-26 for operating the three Oak Ridge Reservation plants, including the Y-12 Plant, and the one plant in Kentucky. No attempt is made under the contract to apportion the $8 million fee to any one of the four plants, but it is estimated that the portion of the fee attributable to operating the Y-12 Plant is approximately $2.0 million. Carbide receives no other income or compensation for its services in operating these DOE plants, other than the said management fee.

23. Prior to 1980, Anderson County had not attempted to impose or assess any type of real property taxes with respect to the Government's Y-12 Plant, nor had it attempted to collect such taxes from either the United States or its operating contractor, Union Carbide Corporation.

24. In 1980, Anderson County sought to impose real property taxes with respect to the Government's Y-12 Plant. By letter dated June 3, 1980, from defendant, Anderson County Property Assessor, Union Carbide was notified that it was being assessed for its interest in the real property at the Y-12 Plant for the year 1980. That assessment assumed a market value of Carbide's interest of $973,200,000.00 and an assessed value of $389,280,000.00.

25. Anderson County's action was based on its conclusion that Union Carbide's presence at and management of the Y-12 Plant was an interest in real estate that could be taxed under Tennessee law. Although possession of and use of real property is taxable as a privilege in many states, the Tennessee Legislature rejected imposing such a privilege tax in 1979, and no such privilege tax exists in Tennessee today. Accordingly, the tax involved herein can only be imposed if Union Carbide Corporation has some legal interest in the realty upon which the

Y-12 Plant is situated. Since the aforementioned contract whereby Union Carbide manages the Y-12 Plant for the United States does not grant any legal interest in the realty to Union Carbide, the tax being asserted is being levied on property of the United States and thus is unconstitutional.

26. On July 15, 1980, the plaintiff filed an action in this Court seeking a declaratory judgment that defendant Anderson County's assessment was unconstitutional and praying for an injunction prohibiting defendant Anderson County from taking any action with respect to the assessment until a final judgment was issued in the matter. That action was designated Civ. 3-80-303.

27. On July 23, 1980, this Court ordered the plaintiff and its contractor, Union Carbide Corporation, to pursue the matter with the defendant Anderson County Board of Equalization and defendant State Board of Equalization, but stated that either party could return to this Court if not satisfied with the decision of these bodies.

28. Union Carbide appeared before the defendant, Anderson County Board of Equalization, challenging the finding and the assessment of Union Carbide's interest in the Y-12 Plant. On September 30, 1980, the defendant, Anderson County Board of Equalization, determined that Carbide owned an interest in the real property of the Government's Y-12 Plant and that the appraised value of such interest was $370,000,000.00. The opinion is attached hereto as *Exhibit B*.

29. Plaintiff's contractor, Carbide appealed both the validity of the tax and the amount of the assessment to the defendant State Board of Equalization.

30. On February 24, 25, and 26, 1981, a hearing was held before the Assessment Appeals Commission, a body created by defendant State Board of Equalization as authorized by TCA § 67-831 to hear appeals regarding assessment, classification and valuation of property. On June 10, 1981, the Assessment Ap-

peals Commission reversed the decision of the defendant Anderson County Board of Equalization, holding unanimously that Union Carbide Corporation owned no real property interest in the Y-12 Plant and, accordingly, making no finding as to the value of any such interest. A copy of this decision and the supporting opinion is attached hereto as *Exhibit C.*

31. On June 17, 1981, defendant Anderson County Board of Equalization petitioned defendant State Board of Equalization to review the decision of the Assessment Appeals Commission, and such petition was granted on June 22, 1981.

32. On July 29, 1981, this Court dismissed, without prejudice, plaintiff's action of July 15, 1980.

33. On January 8, 1982, defendant State Board of Equalization issued a decision, deciding 4 to 3, reversing the opinion of the Assessment Appeals Commission. The State Board concluded that Union Carbide Corporation owned a real property interest in the Y-12 Plant, which interest had an appraised value of $325,000,000.00 for the tax year 1980. A copy of the notice and decision is attached hereto as *Exhibit D.*

34. The attempted imposition, assessment or collection by the defendants of the subject ad valorem real property taxes from either the United States or from Union Carbide Corporation, the United States' operating contractor, was and is in violation of the Federal Constitution, unlawful, void and of no effect because:

> (A) Modification No. A057 to Contract W-7405-ENG-26 between DOE and Union Carbide conveys no real property ownership interests, leasehold, or other property interests in the Y-12 Plant to Union Carbide. The attempt by defendant Anderson County to tax an ownership, leasehold, or other property interest in the Y-12 Plant is an attempt to tax the real property of the United States.

(B) The amount of the assessment, $325,000,000.00, exceeds even the Government's depreciated book value of the Plant, and means that the interest in the real property of the Plant which Anderson County is seeking to tax is the interest of the United States.

(C) Even though Union Carbide enjoys the privilege of access in and to the Y-12 Plant and is using the real property of the Y-12 Plant solely for purposes of performing work for the Government under its contract, defendant Anderson County cannot tax Union Carbide for that privilege because Tennessee law does not permit taxing private companies for the privilege of possessing or using tax-exempt real property.

(D) By attempting to levy such a tax, defendant Anderson County is discriminating against the United States and the contractors with whom it deals.

WHEREFORE, plaintiff United States of America prays as follows:

1. That this Court enter a judgment declaring that the contract between plaintiff United States of America and Union Carbide Corporation neither conveys to nor creates in Union Carbide Corporation any real property ownership, leasehold or any other property interest in the Government's Y-12 Plant and that the defendant State Board of Equalization's interpretation of the subject Government contract is in error.

2. That this Court enter a judgment declaring that the attempted imposition, assessment or collection by the defendants of ad valorem real property taxes from either the United States or from Union Carbide Corporation, its operating contractor, was and is in violation of the Federal Constitution, unlawful, void and of no effect because:

A. The instant real property tax assessment is in reality an unconstitutional attempt by Anderson County to Tax property interests owned by the United States.

B. The amount of the assessment, $325,000,000.00, exceeds even the Government's depreciated book value of the Plant, and illustrates that the interest in the real property of the Plant which Anderson County is seeking to tax is, in reality, the interest of the United States.

C. The interest which Union Carbide has in the Y-12 Plant is not an ownership, leasehold or any other property interest in real estate, but is a privilege of access to and use which is not taxable under the laws of Tennessee.

D. The attempt by Anderson County to levy such a tax unconstitutionally discriminates against the United States and the contractors with whom it deals.

3. That this Court grant the plaintiff its costs in this action and that this Court grant such other and further relief as is just, equitable and proper.

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APPENDIX N

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

NO. 82-431-III

Union Carbide Corporation,
Petitioner,

v.

Lamar Alexander, Gentry Crowell, William C. Koch, Jr.,
William Snodgrass, Harlan Matthews, Claude Ramsey,
Martha Olsen, John E. Sloan, Jr.,
Each of whom is sued in his official capacity as a Member
of the Board of Equalization of the State of Tennessee;
BOARD OF EQUALIZATION OF THE
STATE OF TENNESSEE, and
ANDERSON COUNTY, TENNESSEE,
Respondents.

PETITION FOR REVIEW
(Filed March 8, 1982)

Comes the Petitioner, Union Carbide Corporation, by and through its attorneys, pursuant to T.C.A. 4-5-117, and hereby files this Petition for Review respectfully requesting that this Court review and reverse the decision of the State Board of Equalization which was approved and signed on January 8, 1982, and the Certificate of Assessment entered on January 11, 1982, holding that certain real property located in Anderson County, Tennessee is subject to ad valorem taxation.

The property assessed by Anderson County is owned by the United States of America and used by it for the development and production of nuclear weapons parts. Pursuant to the provisions of the Atomic Energy Act (42 USC 2061 et seq.) the

United States entered into a contract with Union Carbide Corporation for the management and operation of the facility which is known as the "Y-12" Plant. In order to perform its contractual duties Union Carbide has a limited right of access to and occupancy of the Plant. The State Board of Equalization, applying possessory interest, use tax cases and analyses, held that this restricted right of access and occupancy amounted to an interest in real property owned separate from the general freehold which interest was taxable under the provisions of T.C.A. 67-602(6). (The Board's Opinion is attached hereto as Exhibit A) In so holding the majority of the State Board of Equalization in a 4 to 3 decision overruled the unanimous opinion of the Assessment Appeals Commission, which opinion of the Commission distinguished between ad valorem real property tax statutes and cases and possessory interest, use tax statutes and cases. The Commission's opinion held that the restricted right of Union Carbide Corporation to go upon and occupy the Y-12 Plant for the sole purpose of performing its contract with the United States of America was not an interest in real property owned separate from the general freehold and therefore was not subject to ad valorem taxation under the provisions of T. C. A. 67-601(6). (The Commission's Opinion is attached hereto as Exhibit B)

In its 4 to 3 decision the State Board also overruled the Assessment Appeals Commission's finding that the use of the Y-12 Plant for the development and production of nuclear weapons parts was a use of property of the United States for a public purpose, and that the property was exempt from taxation under the provisions of T. C. A. 67-501.

In support of its petition, the Petitioner would show unto the Court the following:

1. The property, against which the ad valorem tax assessment was made, has been certified by the State Board of Equalization, is known as Parcel 702 in the Second District of Anderson

County, Tennessee, and is located within the City of Oak Ridge. Parcel 702 is commonly known as the Y-12 Plant, consisting of approximately 805 acres of land on which approximately 271 buildings and structures are located, all of which property is owned in fee simple by the United States of America and is used by the United States of America for the development and production of nuclear weapons parts.

2. The Petitioner, Union Carbide Corporation, is a New York corporation, duly domesticated in the State of Tennessee. Under and pursuant to the provisions of Government Contract No. W-7405-Eng 26, with the United States Department of Energy (DOE), Union Carbide Corporation manages and operates the Y-12 Plant. All work performed by Carbide at the Y-12 Plant is United States Government work, all materials used and all personal property located thereon are owned by the United States, all products manufactured are owned by the United States Government, and the United States Government maintains strict control over the operation of the plant through the DOE.

3. Defendants, Lamar Alexander, Gentry Crowell, Harlan Matthews, Martha Olsen, Claude Ramsey, John E. Sloan, Jr., William R. Snodgrass and William C. Koch, Jr. (designated representative of Governor Lamar Alexander) are members of the Board of Equalization of the State of Tennessee, and are sued in their official capacities. The offices of the State Board of Equalization are located at Suite 1400 James K. Polk Office Building, 505 Deadrick Street, Nashville, Davidson County, Tennessee. Defendant, Board of Equalization of the State of Tennessee, is an "agency" as defined in Tennessee Code Annotated 4-5-102. Defendant, Anderson County, Tennessee, is a corporate sovereign and body politic, is a governmental subdivision of the State of Tennessee and can be served by serving the County Executive of Anderson County, David O. Bolling at the Anderson County Courthouse, Clinton, Tennessee.

4. This is a Petition to Review a final action of the Board of Equalization of the State of Tennessee, and is therefore governed by T. C. A. 67-840 and by the Administrative Rules and Regulations set forth in T.C.A. 4-5-101 et seq. T.C.A. 4-5-117 specifically provides that a person who is aggrieved by a final decision in a contested case [by an agency as defined in T.C.A. 4-5-102] is entitled to judicial review under this chapter. . ."

5. The issues raised in and grounds for this Petition for Review by Union Carbide Corporation are:

A. The decision of the State Board of Equalization is violative of Tennessee statutory law in its resolution of the following questions.

(a) Whether the real property (Parcel 702 in Anderson County, Tennessee) upon which the assessment has been certified by the Board of Equalization of the State of Tennessee, and which is owned in fee simple absolute by the United States of America, is used for a public purpose and is therefore exempt from ad valorem real property taxation under the provisions of T.C.A. 67-501.

(b) Whether Union Carbide Corporation owns any interest, separate from the general freehold, in the Y-12 Plant facility that would, within the meaning of Sec. 67-601 (1) or 67-602 (6) or any other Tennessee statute, authorize the assessment of ad valorem real property taxes against Union Carbide Corporation.

(c) Whether the valuation of the real property interest of Union Carbide Corporation as fixed by the Board of Equalization, if any such real property interest exists, is excessive.

B. The decision of the State Board of Equalization is arbitrary and capricious.

C. The decision of the State Board of Equalization is unsupported by evidence which is both substantial and material in light of the entire record.

6. By letter dated June 3, 1980, the property assessor of Anderson County, Tennessee, forwarded to Union Carbide Corporation a real property assessment notice for Parcel 702, District 2, Map 14, for the year 1980, showing a 100% valuation of $973,200,000.00. The notice did not reflect the classification of the property. However, the assessor applied a 40% factor to the valuation to arrive at an assessment of $389,280,000.00. As indicated above, Parcel 702 is the Y-12 Plant facility owned by the United States of America in fee simple absolute, is located at Oak Ridge, Anderson County, Tennessee, and is managed and operated by Union Carbide Corporation under and pursuant to provisions of Government Contract W-7405-ENG-26, with the United States Department of Energy.

Subsequently, Union Carbide Corporation objected to and appealed both the validity and amount of the Anderson County assessment against it to the Anderson County Board of Equalization. That Board held a hearing on September 29, 1980, and on the very next day, September 30, 1980, determined that the fee simple absolute value of the Y-12 Plant facility was $510,528,000.00. After applying the appraisal ratio existing in Anderson County at that time (38.5%), the Anderson County Board of Equalization established the 1980 tax year assessment against Union Carbide Corporation at $56,980,000.00.

7. On October 16, 1980, Petitioner, Union Carbide Corporation, filed its appeal to the State Board of Equalization. The State Board of Equalization delegated the authority to hear the appeal to the Assessment Appeals Commission of the State of Tennessee, pursuant to the provisions of T.C.A. § 67-831. A full and complete hearing was held before said Commission on February 24, 25, and 26, 1981. Subsequently, on June 10, 1981, the Assessment Appeals Commission rendered its unanimous

decision holding that the real property being used by Union Carbide Corporation was being used for a public purpose as defined under the provisions of T.C.A. 67-501 and therefore said property was exempt from taxation. The Commission further held that Union Carbide Corporation did not own any interest in real property separate from the general freehold and that Union Carbide's right of access to and management and operation of the Y-12 Plant facility did not constitute a species of real property subject to ad valorem taxation under Sec. 67-602(6). The Commission also heard evidence regarding valuation, but since it struck the assessment for the 1980 tax year in its entirety, the Commission did not reach the question of value.

Anderson County then filed a Petition before the State Board of Equalization to review the Assessment Appeals Commission decision as provided for in T.C.A. § 67-831, which petition was granted. Thereupon, on January 8, 1982, the State Board of Equalization rendered a 4 to 3 decision reversing the holding of the Assessment Appeals Commission. The Board held (1) that the real property assessed was not being used for a public purpose as contemplated under T.C.A. 67-501 and was therefore not exempt; (2) that Union Carbide Corporation does own an interest in the real property as contemplated under T.C.A. 67-602(6); (3) and that the value of Union Carbide's interest in the real property was $325,000,000.00.

8. Union Carbide Corporation insists that the Y-12 Plant was and is used for a public purpose and exempt from taxation pursuant to T.C.A. § 67-501 and the Board of Equalization was in error in not so holding. T. C. A. § 67-501 provides, among other things, that "all property of United States, . . . that is used exclusively for public, county or municipal purposes shall be exempt from taxation". In *Pack* v. *Southern Bell Telephone and Telegraph Company,* 215 Tenn. 503, 387 SW 2d 789 (1965) the Supreme Court of Tennessee, quoting *Minneapolis Gas Company* v. *Zimmerman,* 253 Minn. 164, 91 NW 2d 642 (1958) defined a "public purpose" as follows:

> What is a "public purpose" that will justify the expenditure of public money is not capable of a precise definition, but the Courts generally construe it to mean such an activity that will serve as a benefit to the community as a body and which, at the same time is directly related to the functions of government. The mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity from its public nature if its primary purpose is public.

The Y-12 Plant facility is the largest employer in Anderson County with an annual payroll cost of approximately $141,000,000.00, and utilizes the services of 7100 employees of which 2676 are residents of Anderson County. It is part of a federally owned and integrated system of plants and laboratories operated in furtherance of the responsibilities of the Department of Energy to develop and produce nuclear weapons for the national defense and to engage in research activities incident to the development and production of nuclear weapon parts under and pursuant to the Department of Energy Organization Act. (Public law 95-91) 42 USCA 7101 et. seq. Furthermore, the United States Government has paid $3,599,401.00 as in lieu of tax payments and financial assistance payments to Anderson County during the years it has carried on these governmental operations.

Recognizing such facts, the Assessment Appeals Commission of the State of Tennessee stated in its decision, that "it is difficult to imagine a greater public purpose than the defense of the free world and certainly the manufacture of nuclear weapons is directly related to an exclusive function of the government." To the contrary, however, and despite the above mentioned facts, the State Board of Equalization held that Union Carbide Corporation was not exempt from taxation by construing T.C.A. 67-501 as merely exempting the real proerty of the Federal Government and not exempting the user of any such property. Such a position is not supported by Tennessee

law. Neither the government real property itself, nor the entity using the property are subject to ad valorem taxes under T.C.A. § 67-501 if the property is being used for a public purpose. The Supreme Court of Tennessee has so ruled in a number of cases. see e.g. *West* v. *Industrial Development Board,* 206 TN 154, 332 SW 2d 201 (1960). As a result of the ruling in this case and because they are being used for a public purpose, the land and buildings owned by the City of Nashville and leased to Genesco, Inc. by the Industrial Development Board are not carried on the ad valorem tax roles of Davidson County and no assessment has been made against the City or Genesco on the property or use thereof. This is true notwithstanding the fact that the property is being used for commercial purposes by a private corporation operating for profit.

The operation of the Y-12 Plant facility constitutes a public purpose within the purview of T.C.A. 67-501, and as defined in *Pack* v. *Southern Bell Telephone, supra.* Furthermore, as noted above, the private use of that facility, even if used for a commercial purpose, is exempt from ad valorem taxation.

9. Contract No. W-7405-ENG-26 defines and controls Carbide's type of "use" of or "interest" in the United States' Y-12 Plant. At all times, title to the land on which the Y-12 Plant is located, title to all the buildings that comprise the Y-12 Plant, and title to all the equipment and supplies used at the Y-12 Plant have been and remain in the United States Government. Neither Contract No. W-7405-ENG-26 nor any other agreement, oral or written, nor any deed, lease, conveyance, license, nor any other document confers or purports to confer upon Carbide any estate, leasehold, license, permit, or any other right, title or interest in or to the Y-12 Plant or any portion thereof.

Carbide does not pay and is not obligated to pay any rent, fee, charge, or other consideration, in exchange for its presence or activities at the Y-12 Plant. Union Carbide Corporation does not own, or have any interest in, the real or personal property at the Y-12 Plant to perform its duties pursuant to Contract No. W-7405-ENG-26.

Neither Contract No. W-7405-ENG-26 nor any other document provides for or comtemplates the sale by Union Carbide Corporation or the purchase by the United States of the products manufactured at the Y-12 Plant. The products manufactured at, along with everything else in, the Y-12 Plant, are at all times owned by and controlled by the United States. Union Carbide is not the owner of any interst in the Y-12 Plant separate and apart from the United States Government.

Under the said contract between the United States and Union Carbide no funds of Union Carbide are to be used in any manner with respect to the Y-12 Plant. Expenses of operating the Y-12 Plant are paid by drafts drawn on the United States' funds on deposit in a United States owned bank account. Under this contract with the United States, Union Carbide Corporation is obligated to manage, staff, maintain, and operate the Y-12 Plant within the limits of available Government funds and as directed by the United States. Pursuant to Contract W-7405-ENG-26, the tax which is the subject of this suit, if paid, would be paid directly from the funds of the United States.

The State Board of Equalization is in error in its determination that Union Carbide's right to occupy and use the Y-12 Plant to perform its duties under its contract with DOE, makes Carbide the owner of a separate taxable interest under T.C.A. 67-602(6). That section of the Tennessee Code provides that ". . . all other interests of whatsoever character, . . . owned separate from the general freehold, shall be assessed to the owner thereof . . ." Carbide owns no interest separate from the general freehold subject to ad valorem taxation under the Tennessee statutes. The Board's apparent reliance on the existence of a commercial purpose as a reason for subjecting Union Carbide Corporation to ad valorem taxation is misplaced.

10. The complex of Tennessee ad valorem tax statutes tax ownership of interests in real property which *are owned*

separately from the fee simple ownership of the property. These statutes do not tax interests which *are not owned separately* from the general freehold whether valuable or not. For example, a remainder interest is a valuable interest in real property but is now owned separately from the general freehold as contemplated under T.C.A. 67-602(6). Thus, it is not taxable as a separate interest. *Sherrill* v. *Board of Equalization,* 224 Tenn. 201, 452 SW 2d 857 (1970).

T.C.A. 67-601(1) and T.C.A. 67-602(6) classify and authorize the assessment of real property interests, whether the fee simple or a lesser interest, which are owned by the taxpayer. For ad valorem tax purposes, the statute cannot lawfully be extended by implication to reach Carbide's management and operation of exempt real property where Carbide owns no interest in the property. *Neuhoff Packing Co.* v. *Chattanooga,* 191 Tenn. 395, 234 S.W.2d. 824 (1950). To do so, as the State Baord of Equalization did in the instant case, is error.

In reaching its decision that Union Carbide Corporation has a separate taxable interest in real property, the State Board of Equalization, as did Anderson County before that, relied on cases interpreting possessery interest and privilege tax statutes, The Tennessee statutes at issue in the instant case clearly tax property ad valorem. They do not purport to tax the use of property as a privilege and therefore, the application of privilege taxes may not be equated with the application of real property taxes as was done by the Board. This distinction is recognized and well explained in the opinion of the Assessment Appeals Commission and is made clear in numerous Tennessee decisions. see e.g. *Madison Suburban Utility District* v. *Carson,* 232 SW 2d 277 (1950).

11. The State Board of Equalization committed further error in establishing the value of Union Carbide's interest in the real property owned by the United States Government at $325,000,000.00 for the 1980 tax year. In so doing, the Board

determined that the annual fee which Carbide receives for its management of the Y-12 Plant facility has little relevance to the valuation of Carbide's interest in the Y-12 Plant. The Board's holding was made in spite of the fact that the only right Carbide enjoys by virtue of its contract with the Department of Energy to which a value might be attributed is its right to receive a yearly fee in the amount of $1,800,000.00 for the management, operation, and maintenance of the Y-12 Plant facility. ($1,800,000 being the fee received for 1980) Furthermore, it should be noted for the purposes of valuation, that Carbide received from the Anderson County Property Assessor a tax statement in the amount of $3,393,390.00 for 1980. Notice has also been received that an assessment in the amount of $130,000,000.00 has been made against Carbide for 1981 is $3,445,000.00. Assuming for the purpose of discussion that Carbide was operating the facility under a lease, or owned any real property interest, which it does not, and was paid $1,800,000.00 as an operating fee, ($1,800,000 being the fee received for 1980) it is hardly conceivable that an annual tax in an amount almost double the amount of the fee received by the taxpayer could be justified and reasonable, and for the State Board to set such a valuation, is arbitrary, capricious, not supported by the evidence and is error.

12. The rights of the Petitioner, Union Carbide Corporation, has been prejudiced because the findings, conclusions and decisions of the State Board of Equalization as shown by its opinion and certificate of assessment issued, are: (a) contrary to the express provisions of T.C.A. § 67-501 exempting from ad valorem taxation real property of the United States Government used for a public purpose; (b) contrary to the provisions of T.C.A. § 67-602(6) which state that only interests in real property "owned separate from the general freehold" are taxable ad valorem in Tennessee; (c) arbitrary and capricious; (d) unsupported by evidence which is both substantial and material in light of the entire record, and in addition, the valuation of Union Carbide's interest found to exist by the State Board of Equalization is excessive.

WHEREFORE, PREMISES CONSIDERED, PETITIONER PRAYS:

(1) That proper process issue and be served upon the defendants, Lamar Alexander, Gentry Crowell, William Snodgrass, Harlan Matthews, Martha Olsen, Claude Ramsey, John E. Sloan, Jr., and William C. Koch, Jr., Board of Equalization of the State of Tennessee, and each of them, requiring them to appear and answer this Petition for Review and requiring them to transmit to the Court the original or certified copy of the record in the administrative proceeding in this matter.

(2) That this Court, upon review of the record before the Board of Equalization of the State of Tennessee relating to its certificate of assessment entered on January 11, 1982, enter an order reversing and vacating said certificate of assessment and decreeing that the real property which has been assessed for taxation is used exclusively for a public purpose, that Union Carbide Corporation owns no interest in real property separate from the general freehold owned by the United States of America and that for either or both of said reasons, Union Carbide Corporation is not liable for or subject to ad valorem taxation.

(3) That the assessment of Union Carbide Corporation be stricken in its entirety for the 1980 tax year.

(4) That the Petitioner be granted such other and further relief as the nature of this case would require and that it have general relief.

THIS IS THE FIRST APPLICATION FOR JUDICIAL REVIEW IN THIS CAUSE.

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COST BOND

We acknowledge ourselves sureties in the above action for costs not to exceed $500.00.

KRAMER, JOHNSON, RAYSON,
McVEIGH & LEAKE

BY: Jackson C. Kramer
Partner

APPENDIX O

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
7TH DIVISION
DAVIDSON COUNTY
PART THREE

No. 82-431-III

Union Carbide Corporation

vs.

Lamar Alexander, et al. and
Board of Equalization of the
State of Tennessee, and
Anderson County, Tennessee

MEMORANDUM

This case concerns the taxability of Union Carbide Corporation's interest in the United States Department of Energy's Y-12 plant at Oak Ridge in Anderson County, Tennessee. Carbide, which operates the plant under contract with the United States government, has appealed a decision of the state Board of Equalization which (1) held that Carbide's interest in the government's real property is taxable to Carbide and (2) set the value of Carbide's interest at $325,000,000.00 for 1980. Review by this Court is pursuant to the Uniform Administrative Procedures Act, T.C.A. § 4-5-322.

The fundamental issue is whether Carbide owns an interest in the real property at Y-12 separate from the ownership interest of the government.

At the outset, it should be noted that two prior suits involving taxation of Union Carbide at Oak Ridge, originating in this Court, have been decided by both the Tennessee Supreme Court and the United States Supreme Court. *Carbide and Carbon*

Chemical Corp. v. *Carson,* 192 Tenn. 150, 239 S.W.2d 27 (1951) aff'd. sub nom; *Carson* v. *Roane-Anderson Co.,* 342 U.S. 232, 72 S. Ct. 257, 96 L. Ed. 257 (1952); *United States* v. *Boyd,* 211 Tenn. 139, 363 S.W.2d 193 (1962); aff'd. 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 714 (1964). In *Boyd,* a suit involving a Tennessee contractor's use tax, the United States Supreme Court held that Union Carbide is not an agent or instrumentality of the government but rather an independent contractor engaging in a separate, distinct and taxable acitivity at Oak Ridge.

Union Carbide's Separate Taxable Interest

The taxing statutes' definition of real property includes "all rights thereto and interests therein." T.C.A. § 67-601(1). The statutes explicitly direct that "interests of whatsoever character . . . in real property . . . owned separate from the general freehold, . . . be assessed to the owner thereof separately from the other interests in such real estate . . . as real property." T.C.A. § 67-602(6).

The specific language of the statutes is important. A taxable interest in real property is not limited to fee ownership or even to lesser estates such as leaseholds. The definition includes *all* rights and interests; the legislature has directed that all interests *of whatsoever character* be taxed. That is an an apparent expression of intent by the legislature to extend taxation of real property to the maximum extent possible. The definition is broad enough to include a possessory interest when the fee is separately owned by another.

Property ownership is often explained by using the "bundle of rights" theory. The bundle of rights is compared to a bundle of sticks with each representing ownership of one property right. Those rights in the bundle are divisible, and different rights can be separately owned by different entities. The six basic rights of property ownership are:

(1) The right to use.
(2) The right to sell.
(3) The right to lease or rent.
(4) The right to enter or leave.
(5) The right to give away.
(6) The right to refuse to do any of these.

Property Assessment Valuation,
International Association of
Assessing Officers (1977) p. 13.

To determine Carbide's rights in Y-12, the Carbide-Department of Energy relationship must be examined. Y-12 is a nuclear weapons plant consisting of 805 acres of land and approximately 271 buildings, all of which are owned in fee simple by the United States government. It is one of three major Oak Ridge plants and the only one in Anderson County. Carbide has managed, operated, and maintained the plant under contract with the government continuously since 1947. The government's role in the plant's operation is miniscule. Carbide employs 7,109 employees at Y-12; the government employs less than 100.

The Department of Energy pays Carbide all allowable costs incurred by Carbide plus a negotiated fee. The fiscal year 1980 costs for Y-12 were $272,642,000.00. For the year ending September 30, 1980, Carbide received a fee of $7,000,000.00 for the Oak Ridge operation, and it is estimated that $1,800,000.00 of the fee is attributable to Y-12. The contract can be terminated on six months notice by the government and on one year notice by Carbide. At the time of the evidentiary hearings below, there was no indication Carbide would cease its long term possession of Y-12.[1]

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[1]On May 3, 1982, well after all administrative proceedings in this case were concluded, Union Carbide announced its intention to withdraw as the contractor at Oak Ridge. Carbide has offered to extend the current contract three years beyond the September 30, 1983 expiration date.

Care, custody, and possession of the property is vested in Union Carbide which is responsible for safe-guarding and protecting it. Carbide is liable for loss, destruction, or damage to the property if caused by misconduct of its corporate officers or supervising representatives. The company is required to maintain guard and fire fighting forces. Carbide is granted limited rights in technical data and patents developed in performing its contract at Oak Ridge.

Although Carbide uses and possesses the plant for the government, it does so largely to the exclusion of the government. Carbide has an independent profit making purpose and existence at Y-12.[2] Carbide makes the day-to-day management decisions but must use the property as directed by the government either through the contract or through a specific direction.

Here the taxing authorities are dealing with an unusual arrangement. It is difficult to apply traditional concepts of property ownership which evolved from a medieval, feudal society to this post-World War II arrangement between the government and a contractor for the manufacture of nuclear weapons. Persuasive and logical arguments have been made by both sides, experts have expressed differing opinions, and different tribunals have reached different results.[3] The Board of Equalization itself was sharply divided.[4]

The legislature has vested the Board of Equalization with authority to resolve real property tax disputes, and the role of a

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[2] See *United States* v. *Boyd*, *supra*.

[3] The Assessment Appeals Commission decided in favor of Carbide, holding that Carbide does not have a separate taxable interest in the real property.

[4] The Board of Equalization vote was 4 to 3.

reviewing court is quite limited.[1] Having weighed all the factors, the Board concluded that Carbide does have a taxable interest in Y-12 separate from that of the government's fee ownership. Carbide enjoys two significant rights in Y-12 — the right to use it and the right to enter or leave it. The contract itself expressly gives Carbide possession of the plant. This Court cannot conclude that the Board's decision is in error.

Exemption

Union Carbide asserts that any taxable interest it has in the real property is exempted by state law from taxation because it is "property of the United States . . . used exclusively for public . . . purposes," property specifically exempted by T.C.A. § 67-501. Since Carbide's property interest in Y-12 is separate from the government's, Carbide's property interest is not "property of the United States." Moreover, it is not used "exclusively" for public purposes. In addition to the public purpose of providing for the national defense, the property is used for the private purpose of providing a profit to Union Carbide. *United States* v. *Boyd, supra* 378 U.S. at 46.

The same Tennessee law exemption argument made by Carbide in this case was rejected by the United States Supreme Court in *Jetton* v. *University of the South,* 208 U.S. 489, 28 S. Ct. 375 (1908), in which the Court interpreted Tennessee's tax

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[1] A reviewing court may reverse or modify an agency decision on five grounds. The agency decision must be:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in light of the entire record.

T.C.A. § 4-5-322(h).

exemption statute. In upholding Franklin County's taxation of leasehold interests in the university's tax exempt real property, the Court states:

> As long as different interests may exist in the same land, we think it plain that exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other.

302 U.S. at 500.

Neither is Carbide's interest exempt as a matter of federal law. In 1953 Congress amended the Atomic Energy Act to remove the provision which had been interpreted as prohibiting state taxation of Union Carbide's Oak Ridge operation.[4] After that change in the statute, the United States Supreme Court rejected Carbide's federal immunity contention in *United States* v. *Boyd, supra.*

Union Carbide correctly stresses that the tax here-in question is a tax on ownership of an interest in real property and not a privilege tax or a use tax as in *Boyd.* Although the conclusion that Carbide has a separate interest in the real property is not inconsistent with the *Boyd* decision, that decision does not ad-

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[4] Section 9(b) of the Atomic Energy Act stated:

> The [Atomic Energy] Commission, and the property activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. 42 U.S.C. § 1809(b) (1952 Ed.), repealed by act of August 13, 1953, 67 Stat. 575.

The United States Supreme Court held that the former statute prohibited Tennessee's taxation of Union Carbide's activities at Oak Ridge. *Carson* v. *Roane-Anderson Co., supra.*

dress the issue of a taxable interest in the real property. It does, however, directly address the issue of exemption of Union Carbide's operation at Oak Ridge as a matter of federal law.

Once it is established that Carbide has a taxable interest in the real property apart from that of the government, the holding in *Boyd* becomes fully applicable to the federal exemption issue in this case. The principle is the same; a tax on Union Carbide's separate activity or separate interest is not a tax on the United States government. The Supreme Court has recently even narrowed the circumstances in which government contractors can escape state taxation on federal exemption grounds. *United States* v. *New Mexico*, ____ U.S. ____, 102 S. Ct. 1373, ____ L. Ed. 2d ____ (1982), another suit involving a Department of Energy cost plus fixed fee contract.

Value of Union Carbide's Interest

Two experts testified at the hearing before the Assessment Appeals Commission, one for Anderson County and one for Union Carbide. Because the Commission decided that Carbide did not have a separate taxable interest in the plant, the Commission did not fix the value of that interest. The Board of Equalization valued Carbide's interest at $325,000,000.00, the estimate made by the County's expert.

Anderson County retained J. D. Hollingsworth and Associates of SNashville to conduct an appraisal. The appraisal was not prepared before the County Board's hearing but was presented for the first time to the Assessment Appeals Commission. Mr Hollingsworth considered the three approaches to determine value — market, income, and cost — and concluded that the uniqueness of the property made the cost approach the most reasonable to use. He arrived at a value for the fee simple of $693,560,000.00. He then examined Carbide's interest in the real property and the relationship between Carbide and the government and considered the severe restrictions placed on Carbide's use of Y-12. He then arrived at a value of Carbide's separate interest.

It is the responsibility of the administrative tribunal, not the reviewing court, to resolve issues of fact; the reviewing court is specifically prohibited from substituting its judgment from that of the agency's on questions of fact.[7] Hollingsworth's testimony and his report amply support the Board's decision.

Moreover, there appear to be sound reasons for accepting Hollingsworth's appraisal over Carbide's. Mr. Hollingsworth is an experienced, qualified career appraiser. Carbide's expert is a realtor. Though he is obviously a competent one, skilled in selling industrial property, he does not share Hollingsworth's appraiser credentials. The contract between the Department of Energy and Carbide is crucial to valuing Carbide's interest. Carbide's expert had not even reviewed the contract; Mr. Hollingsworth had considered it in some detail.

Finally, Carbide asserts that its May 1982 announcement, that it is withdrawing from Oak Ridge within several years, should be considered by this Court and that this Court should remand the case for a revaluation in light of the announcement. The instant case involves taxes for 1980; the relevant facts are those which existed then, not now.

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[7] The Administrative Procedures Act states:

> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

T.C.A. § 4-5-322(h).

CONCLUSION

The decision of the Board of Equalization is affirmed. Counsel for the Board will prepare the decree.

/s/ Robert S. Brandt, Chancellor

February 2, 1983

cc: Jackson C. Kramer
G. Wilson Horde
George John Keto
Mike Lawson
Charles L. Lewis

No. 83-320

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDERSON COUNTY, TENNESSEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court erred in dismissing the government's complaint on the basis of the abstention doctrine.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A13) is reported at 705 F.2d 184. The opinion of the district court (Pet. App. A1-A3) is reported at 547 F. Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1983. A petition for rehearing was denied on June 10, 1983 (Pet. App. A14). The petition for a writ of certiorari was filed on August 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States owns in fee simple the Oak Ridge Reservation, consisting of 37,000 acres of land in Tennessee. It is the site of major federal atomic energy facilities, devoted principally to development of nuclear energy and production of nuclear weapons for national defense (Pet.

App. A5). Among these facilities is the Y-12 Plant, located on the Reservation within the boundaries of petitioner Anderson County. The Y-12 Plant, like the other facilities on the Reservation, is managed for the United States by Union Carbide Corporation under a standard management contract developed by the Atomic Energy Commission. (*Ibid.*) This contract, which is renegotiated periodically, provides Union Carbide a fixed annual fee (plus costs) for managing and maintaining the federal facility. The fee is unrelated to the value of the property managed and to the output of weapons at the Y-12 Plant.

All real and personal property used in the operation of the Y-12 Plant, including inventories, work-in-process, and finished goods, is owned by the United States (C.A. App. 19). Title to the land on which the Plant is located, to the buildings that comprise it, and to the equipment and supplies used in it, is in the name of the United States (C.A. App. 20). All costs of operating the Plant, including the costs of materials and supplies procured by Union Carbide as procurement agent, are liabilities of the United States (Pet. App. A5; C.A. App. 19). Union Carbide advances no funds and commits no property of its own to management of the Plant (Pet. App. A5). Absent willful misconduct or the like, Union Carbide is not liable for damage to or loss of any property at the Plant (Pet. App. A5; C.A. App. 20).

Union Carbide performs no work as a private entrepreneur at the Y-12 Plant, either on its own behalf or on behalf of anyone else (Pet. App. A5). Union Carbide has no right to use Plant property in its own business, but merely a right of access to perform, under the direction of the United States, the duties stipulated in its management contract (*ibid.*). Union Carbide is not obligated to pay rent or other consideration in exchange for its presence at, or its right of access to, the Plant (*ibid.*). The management contract can be terminated at any time at the option of the United States

(C.A. App. 5-6). Union Carbide has managed the Plant, under substantially identical contract terms, since 1943 (Pet. App. A56).

In March 1980, petitioner Anderson County determined that Union Carbide was the owner of a "real property interest" in the Y-12 Plant and proposed to assess an ad valorem tax against that alleged interest (Pet. App. A6). Union Carbide contested the proposed assessment before the Anderson County Board of Equalization; when that challenge proved unsuccessful, appeals followed to the Assessment Appeals Committee and the State Board of Equalization (Pet. App. A6).[1] In January 1982, the State Board of Equalization upheld petitioner's assessment, concluding that Union Carbide was the owner of a "real property interest" under Tennessee law; that Union Carbide's property interest was not exempt from tax under Tennessee law as "property of the United States * * * used exclusively for public * * * purposes', and that, in view of Union Carbide's status as an independent contractor, the levy was not unconstitutional as a tax against the United States (Pet. App. A7). The value of Union Carbide's "real property interest" was found to be $325 million, or $50 million more than the depreciated book value of the Y-12 Plant as carried on the United States' books (Pet. App. A54, A58). This assessment would subject Union Carbide to an annual real property tax of over $3 million, or $1 million more than its annual fee for managing the Plant (C.A. App. 19).

2. On February 12, 1982, the United States, which under the management contract is obligated to pay all costs incurred in operating the Y-12 Plant, brought this action in

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[1]The United States, in order to preserve its claim of sovereign immunity, refused to submit to the jurisdiction of these state and local tax authorities, and accordingly did not join in Union Carbide's petition for administrative review (Pet. App. A6).

the United States District Court for the Eastern District of Tennessee, challenging the legality of petitioner's proposed tax on Union Carbide. The complaint sought a declaration that the management contract did not create any real property interest in, or convey any real property interest to, Union Carbide, and that petitioner's proposed levy was unconstitutional because it represented an attempt to tax property owned by the United States. Pet. App. A7, A51. The district court dismissed the complaint, holding that it was required to abstain under the doctrines of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and *Younger* v. *Harris*, 401 U.S. 37 (1971) (Pet. App. A2). The court noted that Union Carbide in March 1982 had filed in Tennessee chancery court a petition for review of the proposed assessment, challenging its validity and amount on various state-law grounds (*ibid.*). The court held that these pending state proceedings mandated abstention on its part, lest it "be required to make a constitutional determination based on speculative interpretation of state law" (*id.* at A3).[2]

The court of appeals unanimously reversed. It held that abstention under the *Pullman* doctrine was inappropriate because Tennessee's tax statutes were "not ambiguous" and because "the most important questions of law presented by the suit" — both "the threshold issue," involving interpretation of Union Carbide's rights under the management contract, and "the ultimate constitutional challenge" to Tennessee's tax — were "federal, not state, questions." Pet.

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[2]In February 1983, the chancery court ruled adversely to Union Carbide, holding that it had a "real property interest" in the Y-12 Plant under Tennessee law by virtue of its management contract; that such property interest was not tax-exempt as "dedicated to a public purpose"; and that the State Board of Equalization had correctly computed the amount of the tax (Pet. App. A74-A81). Union Carbide has appealed that decision to the Tennessee Court of Appeals, where the case is now pending.

App. A10-A11. The Sixth Circuit assumed arguendo that the *Younger* doctrine extended to chancery court proceedings of the sort involved here (*id.* at A11). It noted, however, that the doctrine applies only when "important state interests are involved," and it held that Tennessee's interest in administering its tax system without interference was "at best concurrent with and at worst totally subservient to the coexisting interest of the United States" in obtaining a federal-court determination of its constitutional immunity from Tennessee's tax. *Id.* at A11-A13, citing *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[3]

ARGUMENT

The court of appeals properly applied the doctrine of abstention to the facts of this case. Petitioner does not allege (nor is there) a conflict among the circuits on the question presented.[4] There is no basis for review by this Court.

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[3]The court of appeals denied petitioner's motion for a stay of mandate (Pet. App. A15) and remanded the case to the district court for decision on the merits (*id.* at A13). On November 8, 1983, the district court awarded summary judgment in favor of the government. (The opinion on remand, which is not officially reported, is reprinted at App. 1a-8a, *infra*.) The district court held (App. 6a-8a, *infra*) that the management contract gave Union Carbide no more than a license to perform services on government-owned property and created in Union Carbide no estate in land capable of being subjected to Tennessee's real property tax; the district court accordingly found it unnecessary (*id.* at 8a) to reach the constitutional question. Although the decision on remand does not render moot petitioner's challenge to the court of appeals' holding that there should be no abstention, it is an additional consideration counselling against this Court's review of the abstention issue, considered in isolation, at this stage of the proceeding.

[4]Petitioner does allege (Pet. 26) that the Sixth Circuit's decision here conflicts with its previous decision in *United States* v. *Ohio*, 614 F.2d 101 (1979). But the panel below (Pet. App. A8-A10) carefully distinguished that earlier decision, and petitioner's request for rehearing, which alleged an intracircuit conflict, was denied. Pet. App. A14.

1. This Court has repeatedly held that "[t]he doctrine of abstention * * * is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, No. 81-1203 (Feb. 23, 1983), slip op. 11-12 (citing cases). The " 'pendency of an action in the state court is no bar to proceedings concerning the same matter' " in a federal forum, and the federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), quoting *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910). Abstention "can be justified * * * only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Moses H. Cone Memorial Hospital*, slip op. 11-12, quoting *Colorado River*, 424 U.S. at 813.

2. Abstention under the *Pullman* doctrine is appropriate in cases involving threshold and unsettled issues of state law, where " 'a federal constitutional issue * * * might be mooted or presented in a different posture' " by a state court adjudication. *Colorado River*, 424 U.S. at 814, quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). In this case, petitioner contends that Union Carbide acquired a "real property interest" in the Y-12 Plant by virtue of its management contract with the United States. The United States contends that the contract conveys no property interest of any sort to Union Carbide, and that petitioner's proposed tax is thus of necessity an attempt unconstitutionally to tax federally-owned property. Thus, as the court of appeals put it, "the 'unsettled question' is whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant" (Pet. App. A10; emphasis in original).

This question is exclusively one of federal law. It is well settled that the "validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944). Accord, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1948). It is likewise well established that federal law determines when and to what extent other parties may obtain rights of ownership in federal land. *E.g., Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 669-670 (1979). And it is well established that, in assessing claims of federal immunity from state taxation, a state court's characterization of its tax is immaterial. *E.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1969). Thus, when a State seeks to levy a real property tax on a federal contractor's alleged interest in a federal facility, the controlling question is whether the contract, as a matter of federal law, gives rise to a property interest on the contractor's part separate and distinct from that held by the United Sates. See *United States* v. *Colorado*, 627 F.2d 217, 219 (10th Cir. 1980), aff'd on appeal, 450 U.S. 901 (1981).

In short, the threshold and paramount issue in this case is a federal question involving construction of the federal management contract. There are no ambiguous state statutes and no unsettled questions of state law whose interpretation or resolution could affect either this threshold issue or the ultimate constitutional decision. The court of appeals

thus correctly determined that *Pullman* abstention was inappropriate here.[5]

3. Abstention under the *Younger* doctrine is appropriate where "federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." *Colorado River*, 424 U.S. at 816. The doctrine has been expanded to prevent interference with various state judicial proceedings of a quasi-criminal nature. *E.g., Middlesex County Ethics Comm.*, 457 U.S. at 437 (attorney disciplinary proceeding); *Moore* v. *Sims*, 442 U.S. 415 (1979) (juvenile custody proceeding); *Juidice* v. *Vail*, 430 U.S. 327 (1977) (contempt proceeding); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (nuisance abatement proceeding). The test is whether "important state interests are involved." *Middlesex County Ethics Comm.*, 457 U.S. at 432.

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[5]Petitioner contends (Pet. 15) that the Tennessee courts might interpret the State's real property tax to reach only freehold and leasehold interests, and thus not to reach interests of the type held by Union Carbide, *regardless* of how the management contract is construed. But the mere possibility that a state court might interpret its tax law in such a way as to moot the whole controversy is not sufficient to warrant *Pullman* abstention in the circumstances presented here. The federal courts have repeatedly decided, without even discussing abstention, challenges brought by the United States to state taxes sought to be levied on federal contractors, even though the state tax had never been construed by the state courts, could fairly be labeled ambiguous, or was susceptible of a construction that would have exempted federal activities from the levy. See, *e.g., Washington* v. *United States*, No. 81-969 (Mar. 29, 1983), slip op. 3; *United States* v. *New Mexico*, 455 U.S. 720, 728 & n.9 (1982); *United States* v. *Colorado*, 460 F. Supp. 1184, 1187 (D. Colo. 1978), aff'd, 627 F.2d 217, 219 (10th Cir. 1980), aff'd on appeal, 450 U.S. 901 (1981); *United States* v. *California State Board of Equalization*, 683 F.2d 316 (9th Cir. 1982). Where state tax authorities have interposed abstention objections, the federal courts have typically rejected them, except where the controlling issue is *exclusively* one of state law. Compare, *e.g., United States* v. *Nevada Tax Comm'n*, 439 F.2d 435, 439 (9th Cir. 1971) (rejecting *Pullman* abstention), and *United States* v. *New Mexico*, 291 F.2d 677, 679-680 (10th Cir. 1961) (same), with *United States* v. *Ohio*, 614 F.2d 101 (6th Cir. 1979) (finding abstention proper where sole issue involved construction of Ohio law).

As the court of appeals intimated (Pet. App. A11), there is considerable doubt whether the *Younger* doctrine could properly be extended to chancery court proceedings of the sort involved here. Those proceedings do not "bear a close relationship to proceedings criminal in nature," nor do they involve "the functioning of the state judicial system." *Middlesex County Ethics Comm.*, 457 U.S. at 432. Moreover, the premise of *Younger* abstention — that the federal plaintiff's federal claims can be fully and fairly adjudicated in the pending state proceeding —is wholly missing where (as here) the federal plaintiff is not even a party to the state-court action. There is no precedent for interpreting *Younger* to require that a federal plaintiff *intervene* in a state-court suit in which it is not involved. And to establish any such rule against the United States would be particularly unsound.

In any event, even if we assume arguendo that the *Younger* doctrine could be extended to cases of this type, the court of appeals properly held (Pet. App. A11-A13) that abstention was inappropriate here. It is of course true that Tennessee generally has an "important interest" in administering its tax laws without federal interference. This interest is codified in 28 U.S.C. 1341, which prevents federal courts from restraining the assessment or collection of state taxes "where a plain, speedy, and efficient remedy" is available in a state forum. This Court has consistently held, however, that Section 1341 is "inapplicable to suits brought by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.' " *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976), quoting *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. at 728-729. The court of appeals was thus correct in concluding that where suit is brought, as here, by the United States, a State's interest in making unfettered tax

assessments is not sufficiently important to warrant abstention on *Younger* grounds.[6]

4. Abstention under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), is appropriate where "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River*, 424 U.S. at 814. The principal question in this case, however, involves construction of the federal contract; contrary to petitioner's contention (Pet. 18), a declaration "that rights do, or do not, exist under the contract" does not "require an interpretation of state property laws." It is true that the district court, having decided this threshold federal question, would then need to determine whether Union Carbide's property interest (if any) was a real property interest, rather than some other kind of property interest, within the meaning of the Tennessee statute. But this is plainly not the sort of complex and multifaceted administrative and policy question that the *Burford* doctrine contemplates. Indeed, the federal courts here will not undertake (Pet. 18) to "define[] the nature of 'real property' "for Tennessee tax purposes generally, but will do so only in the limited context of a tax sought to be imposed on a federal contractor at a federal facility.

5. Finally, there is no basis for petitioner's contention (Pet. 25-29) that abstention is justified by the need to avoid "piecemeal litigation" under the *Colorado River* doctrine. See 424 U.S. at 818-820. "By far the most important factor

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[6]Petitioner's reliance (Pet. 24) on *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), in support of *Younger* abstention is misplaced. That case involved a declaratory-judgment action by a corporation, and the Court rested its decision on the statutory predecessor of 28 U.S.C. 1341.

in [the Court's] decision to approve the dismissal in [*Colorado River*] was the 'clear federal policy * * * [of] avoidance of piecemeal adjudication of water rights in a river system,' " a policy that was evidenced by a federal statute. *Moses H. Cone Memorial Hospital*, slip op. 13, quoting *Colorado River*, 424 U.S. at 819. No analogous federal statute or policy is present here. Indeed, the only federal statute favoring state-court adjudication of state tax disputes — 28 U.S.C. 1341 — is inapplicable to suits brought by the United States. See p. 9, *supra*. In any event, Union Carbide's state-court suit is not duplicative of the government's federal one. The former action raises mainly state-law issues of property valuation, tax computation, and statutory construction, issues that are relevant only if the tax is ultimately sustained.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

DOJ-1983-11

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
V.	:	CIV. 3-82-83
	:	
ANDERSON COUNTY, TENNESSEE, ET AL.	:	
	:	

[Filed November 8, 1983]

MEMORANDUM

The United States brought this action seeking a declaration that a state property tax imposed upon a government contractor is invalid. The case is now before the Court on cross motions for summary judgment.

The United States owns in fee simple approximately 811 acres and 300 buildings and structures in Anderson County, Tennessee. This property is known as the Y-12 Plant which is a part of an integrated system of federally owned laboratories and plants operated by the United States Department of Energy [DOE] to develop and produce nuclear weapons for national defense. Union Carbide runs Y-12 for DOE pursuant to Government Contract No. W-7405-ENG-26 [Contract]. Defendants contend that the Contract gave Union Carbide a real property interest as defined by Tenn. Code Ann. § 67-601(1) to which a real property tax attached pursuant to Tenn. Code Ann. § 67-602.

Tennessee Code Annotated § 67-601(1) defines real property "to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under

§ 67-612; or machinery and equipment affixed to realty (except or otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal." Section 67-602 provides:

> The function of assessment shall be as follows, to wit:
>
> . . . .
>
> (6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property.

The Court understands these Tennessee statutes to mean that Tennessee intends to tax *any* interest in real property. *See United States v. Anderson County, Tennessee*, 705 F.2d 184, 187 (6th Cir. 1983).

Although Tennessee law defines real property, whether the Contract conveyed any real property to Union Carbide is a question of federal law. 705 F.2d at 187, *citing United States v. Allegheny County*, 322 U.S. 174 (1977). The questions before the Court are: 1) whether the Contract conveyed to Union Carbide any real property interest in the Y-12 facility, and if so, 2) whether the Supremacy Clause of the United States Constitution prohibits Tennessee from imposing a property tax on Union Carbide.

Pursuant to a series of continual contracts, Union Carbide has run Y-12 for the federal government since 1947. The last contract defining this relationship was scheduled to

expire on September 30, 1983. Union Carbide did not renew the Contract but the parties have extended the Contract to April 1, 1984.

The stated purpose of the Contract is for Union Carbide to manage and operate Y-12. For its services, Union Carbide receives an annual fixed fee plus costs. The fee is unrelated to the value of Y-12. The Contract does not expressly convey to Union Carbide a lease, easement, license, privilege, franchise or any property interest in Y-12. The Contract provides that title to all property in the care and custody or possession of Union Carbide in connection with the Contract will remain vested with the government. Union Carbide is required to reasonably care for all government property under its control at Y-12. The Contract calls for Union Carbide to maintain guard and fire-fighting forces at Y-12. Union Carbide, however, is not liable for loss or damage to government property unless such loss or damage is the result of willful misconduct, bad faith or failure to reasonably comply with DOE directives.

The cost of operating Y-12 is borne by the United States. Union Carbide uses none of its property or funds to operate Y-12. The Contract calls for the use of "advance funding" in which Union Carbide pays creditors from a government account. *See United States v. New Mexico*, 455 U.S. 720, 725-27 (1982). DOE, however, has retained the right to make direct payments to creditors. Under the advanced funding procedure, title to property purchased by Union Carbide for the operation of Y-12 passes directly from the supplier to the government. *Id.*

Union Carbide performs only government work at Y-12. "Union Carbide performs no work as a private entrepreneur on behalf of itself or any other private entity at the Y-12 Plant." 705 F.2d at 185. With limited exception, all technical data produced at Y-12 becomes the property of

the United States. Union Carbide may reserve the right to use any invention it develops at Y-12 for its own private use, however, the government obtains the patent rights to any invention developed at Y-12.

At the time this litigation began there were 7,109 Union Carbide employees and 90 government employees at Y-12. DOE retains the right to inspect Union Carbide's work at any time and any manner it deems appropriate.

The Contract also provides that DOE may terminate the Contract if Union Carbide defaults in performance or "whenever, but upon not less than six (6) months days [sic] prior written notice to [Union Carbide], for any reason DOE shall determine any such termination is for the best interest of the Government." Contract Art. VIII(a)(1) (the Court assumes that six *months* prior notice is required for termination absent default). Union Carbide may terminate the Contract upon one year's notice. Any termination of the Contract would be without prejudice to any claims that either party would have against the other.

A contract between a corporation and the United States government is to be construed and the rights of the parties are to be determined by the application of the same principles of law applicable to contracts between private individuals. *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925). The principles of general contract law apply to government contracts. *Pribe & Sons v. United States*, 332 U.S. 407, 411 (1947). Considered in whole and in part, the Court finds nothing ambiguous or confusing about the rights and obligations of this Contract. In such cases, the contract language itself reveals the intent of the parties, and rules of construction need not be considered. *See, e.g., Pavlik v. Consolidated Coal Co.*, 456 F.2d 378 (6th Cir. 1972). *See generally*, 3 Williston on Contracts § 609 (revised edition, 1936). In determining what interest Union Carbide

may have in Y-12, however, the Court is not bound by the terminology used by the parties to the Contract. Union Carbide and the United States have a history of resisting state taxes levied on Y-12. *See, Carson v. Roane-Andrerson Co.*, 342 U.S. 232 (1952); *United States v. Boyd*, 378 U.S. 39 (1964). It would be clearly unfair to allow Union Carbide to avoid a tax if the United States granted Union Carbide a real property interest, but simply did not label it a real property interest.

A contractor with a similar government contract for the operation of the Rocky Flats Plant has been held not subject to a Colorado property tax. *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *aff'd without opinion sub nom.*, 450 U.S. 901 (1981). In that case, however, Colorado was attempting to tax the contractor for the full value of the property. The federal government clearly retained some real property interest in Rocky Flats. Accordingly, a tax on the full value of the property would be at least a partial tax on the United States. The Tenth Circuit concluded that the substance of the Colorado tax was not to tax the contractor's use of government property, "but to lay an ad volorem general property tax on property owned by the United States." *Id.* at 221. Although the court stated that the contractor was "merely going onto government property where it perform[ed] its management services," *Id.* at 220, the Tenth Circuit was not presented with the question of whether the contract conveyed a real property interest. Therefore, the *Colorado* decision does not resolve this case.

Defendants recognize that the United States retained a real property interest in Y-12. Accordingly, defendants claim they have not sought to tax Union Carbide for the full value of Y-12. Rather, defendants claim they have sought to segregate the real property interest retained by the United States from the interest conveyed to Union Carbide.

There is an action parallel to this case pending in the Tennessee state courts. Union Carbide has appealed a Chancery Court decision holding that Union Carbide owned a taxable property interest in Y-12. *Union Carbide Corp. v. Alexander*, No. 82-431 - III (Davidson County Ch. Feb. 2, 1983). The chancellor correctly determined that Union Carbide had the right to leave and enter and the right to use Y-12. Applying the "bundle of rights" theory of property ownership, the chancellor concluded that Union Carbide did own a property interest in Y-12. The chancellor did not explain, however, why Union Carbide's property interest in Y-12 was a real property interest.

This Court is in agreement with the chancellor when he stated that "[i]t is difficult to apply traditional concepts of property ownership which evolve from a medieval, feudal society to this post-World War II arrangement between the government and a contractor for the manufacture of nuclear weapons." *Id.* at 5. Because the Tennessee tax statutes maintain the distinction between real and personal property, however, this Court must maintain the distinction.

Although Union Carbide has the right to enter, leave and use Y-12, it does not have a leasehold interest in Y-12. Generally, during the existence of a lease, the tenant is the owner of the premises and entitled to exclusive possession. 51 C.J.S. *Landlord and Tenant*, § 202(6). Union Carbide does not have exclusive possession of Y-12. Nowhere in the Contract has DOE given up its right to leave and enter Y-12. Nor has DOE given up its right to use Y-12 for any purpose that does not conflict with Union Carbide's contractual obligations. DOE has retained the right to inspect the Y-12 operation whenever and however it deems appropriate. Although government employees at Y-12 are far outnumbered by Union Carbide employees, the right to inspect is significant. Moreover, because of the nature of nuclear

weapons, it is not unreasonable to expect the government to greatly increase its presence during war, international crisis, or a time when sabotage is experienced or expected. The detailed nature of the contract indicates that DOE retains great control over Union Carbide's operation of Y-12. Union Carbide's management program must be approved by DOE and Union Carbide may not construct, alter or repair any physical structure at Y-12 without DOE permission. The contract does not purport to be a lease "and the control over the business of [Union Carbide] and rights of entry and inspection retained by the owner of the realty are so extensive as to negative any notion that a lease of the realty was intended or effected." *United States v. Taylor's Oak Ridge Corp.*, 89 F. Supp. 28, 30 (E.D. Tenn. 1950).

Admittedly, defendants do not claim that Union Carbide has a leasehold in Y-12. Indeed, defendants never specify what real property interest Union Carbide may have in Y-12. The Court is convinced that Union Carbide's interest is a mere license. "A 'license,' with respect to real estate, is an authority to do a particular act or series of acts on another's land without possessing any estate therein. It is not assignable, and is generally revocable at the will of the licensor." *Barksdale v. Marcum*, 7 Tenn. App. 697, 709, *cert. denied*, (Tenn. 1928) (citation omitted). The Contract in this case provides that "[n]either this contract nor any interest therein nor claim thereunder shall be assigned or transferred by [Union Carbide], except as expressly authorized in writing by DOE." Contract at Art. XXI. Additionally, Union Carbide's right to use Y-12 is revokable at the will of DOE. Although DOE is required to give six months notice before termination of the Contract, a period of notice before revocation is not inconsistent with a license in real property. *See United States v. Hodge*, 89 F. Supp. 25, 26 (E.D. Tenn. 1949).

A license creates no estate in land and generally is not considered an interest in land. 53 C.J.S. Licenses § 79 (1948); 25 Am. Jur. Easements and Licenses § 123 (1966). *But see*, Restatement of Property § 512 & Comment c (1944). The Court has no reason to believe that Tenn. Code Ann. § 67-601(1) was designed to tax anything other than that which is traditionally defined as an interest in real property. The Court, therefore, concludes that within the meaning of Tennessee's real property tax, Union Carbide has no real property interest in Y-12.

Because the Court concludes that Union Carbide has no real property interest in Y-12, it is not necessary to determine whether the Supremacy Clause of the United States prohibits Tennessee from imposing a property tax on Union Carbide. The Court notes, however, that defendants could tax Union Carbide's use of the Y-12 real property. *United States v. County of Fresno*, 429 U.S. 452 (1977). The Court has no reservations concerning a local tax upon Union Carbide. The Court simply does not believe that defendants can tax Union Carbide by way of Tennessee's real property tax since, under Tennessee law, Union Carbide's interest in Y-12 is not a real property interest.

It is therefore ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that defendant's motion for summary judgment be, and the same hereby is, denied.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge

No. 83-320

IN THE

Supreme Court of the United States

October Term, 1983

Anderson County, Tennessee
and
State Board Of Equalization Of Tennessee,
Petitioners,

v.

United States Of America
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The United States in its Brief in Opposition No. 83-320, (hereinafter referred to as Brief) attempts to lead this Court from the question presented in this case.

Question In Petition For Writ

Whether the Sixth Circuit properly reversed and remanded the district court's abstention and dismissal of a complaint by the United States alleging that a real property tax levied against its federal contractor was invalid on state and constitutional law grounds while the contractor, at the direction and with the financing of the United States, was contemporaneously litigating the validity of the tax on state law grounds in on-going proceedings in the state courts.

Question In Brief Of The United States In Opposition

Whether the court of appeals correctly held that the district court erred in dismissing the government's complaint on the basis of the abstention doctrine.

In contemporaneous lawsuits, the one in the federal court brought by the United States and the other in the state court brought by the federal contractor at the direction and with the financing of the United States, the real property tax assessed against the federal contractor is being contested. When a litigant, or litigants, while challenging the construction of a state statute contemporaneously files suit in federal court on issues involving that statute, the federal court should decide that the state statute must be definitively interpreted by the state courts before it can be applied in the federal suit. That the Sixth Circuit did not follow this course, but reversed the decision of the district court to abstain and dismiss, brings it into conflict with this Court's guidance in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ____U.S.____ 103 S. Ct. 927 (1983).

By litigating, or directing the litigation, of the real property taxation of its contractor in both the federal and state courts contemporaneously, the United States initiated a process creating conflict and confusion between the federal and state courts which the Sixth Circuit perpetuated by first reversing the district court's abstention and dismissal and then denying the petitioner's motion for a stay of mandate.[1]

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[1]The argument presented by the United States (Brief p. 9) that it is not a party to the ongoing proceedings in the state courts should be modified. "[P]ersons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause'" *State of Montana* v. *United States*, 440 U.S. 147 at 154 (1979).

The attempt of the United States to shift the question of abstention to one of contract construction (Brief p. 7) should not mislead this Court, nor should their effort to remove state law issues from this case by contending that whether its contract conveyed any real property interest to its contractor does not "require an interpretation of state property laws" (Brief p. 10). That contention is inconsistent with *Reconstruction Finance Corporation* v. *Beaver County*, 328 U.S. 204 (1946) which requires a state law definition of "real property". *See* Pet. 19-21.

The Memorandum Opinion of the district court filed November 8, 1983 (Brief App. 1a-8a) confirms petitioner's position that the pivotal issue is one of unsettled state law. The district court agreed with petitioners that state law must define real property taxable interests. Compelled on remand to construe what is clearly an unsettled state law issue, the court determined that a court of general jurisdiction in Tennessee was in error in its construction of Tennessee law. (Brief App. 6a-8a).

This type of tension and confrontation between state and federal jurisdictions should have been avoided and should now be avoided. The error of the Sixth Circuit as challenged by petitioners has been confirmed.

The appropriate course of action on the suit filed in the district court February 12, 1982, by the United States was abstention and dismissal. The ruling of the Sixth Circuit reversing that decision has created an unwholesome precedent, which, if allowed to stand, would give the stamp of validity to tactics of litigating an issue piecemeal in the state and federal courts with all the attendant conflict, confusion and waste of judicial resources already apparent. The need for review is manifest.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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